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A FRESH LOOK AT AGENCY "DISCRETION"

JOHN M. ROGERS*

INTRODUCTION

Lawyers who represent or litigate against government agencies must wrestle so frequently with the concept of agency "discretion" that they may be forgiven for believing that the term is devoid of intrinsic meaning—a chameleon deriving substance only from its particular context. For instance, mandamus will lie only for ministerial acts, as opposed to "discretionary" ones. Agency acts that are "by law committed to agency discretion" are not reviewable in court under the federal Administrative Procedure Act (APA).¹ However, agency actions are reviewed for "abuse of discretion." On the other hand, tort suits against the government will not be allowed for exercises of "discretionary functions," and individual government officials may be absolutely immune from tort suits only for exercises of "discretionary" duties. Because courts making these determinations do not always use the same criteria, it is easy to conclude that there is no consistent definition of "discretion" that will contribute to sound analysis in each context. Such a definitional analysis is suggested here. The approach will be inductive—to set forth an analysis and then to see if it works satisfactorily. The test will be whether the definitions comport with sound case law while furthering the policy reasons for the use of the concept of discretion in each particular context.

An agency constantly has to make choices. It has to choose, for example, whether to prosecute someone, whether to grant a license, which of several persons to hire, and which of several possible standards of conduct to adopt. The agency generally will be limited by "the law"² in what choices it can make; it also may be limited in the bases it may use for making those choices.

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1. Administrative Procedure Act, 5 U.S.C. § 500 (1976) [hereinafter cited as APA].

2. The law here means the Constitution, valid statutes, valid regulations, and applicable common law.

The law may be said to give an agency discretion when under clear facts the agency may make more than one choice. If, however, on undisputed facts the law permits only one choice, then the agency is said to have no discretion.³ For example, if an agency is permitted by law to hire citizens between the ages of eighteen and forty, it has great discretion—there are many possible choices. But, if an agency *must* grant a certain type of license to every applicant who pays ten dollars, is over eighteen, and has better than 20/40 vision, then in the absence of dispute over payment, age, or vision, the agency has no discretion: the law requires it to give the license.

An agency “exceeds” its discretion when it makes a choice outside the range of possibilities permitted by law. For instance, in the hiring example, an agency exceeds its discretion by hiring a noncitizen or a seventeen-year-old person.

An agency “abuses” its discretion when it makes a choice *within* the range of permissible possibilities, but for a reason or on a basis that is not allowed by the law. Typical bases for decisionmaking that the law might not allow are the applicant’s race, the decisionmaker’s malice, casting of lots, or receipt of kickbacks. In the example, a twenty-year-old citizen would be a legally permissible choice, but if the choice were made on the basis of bribery, the agency would have abused its discretion because this basis is not permitted by the law.

Although abuse of discretion is undesirable, in one sense it is not as bad as exceeding discretion. The choice made is permissible under the law. That is, if the agency had arrived at the same choice for a legitimate reason, the law-givers would have been satisfied.

Agency *action* is “committed” to agency discretion when the law does not limit the agency’s bases for decisionmaking. For instance, if the law permits the Army to assign a private to a particular post for any reason whatsoever, then the decision is committed to Army discretion.

3. See K. Davis, *Discretionary Justice: A Preliminary Inquiry* 4 (1969) [hereinafter cited as Davis, *Discretionary Justice*]; Jaffe, *Judicial Review: Question of Law*, 69 Harv. L. Rev. 239, 247-49 (1955) [hereinafter cited as Jaffe, *Judicial Review*]. Professor Davis’ book deals primarily with the greater policy questions of when and how much discretion should be allowed under the law.

Finally, particular types of agency "*functions*" may be described as "discretionary" because the activity consists largely of selecting among permissible choices, rather than of determining which is a required choice. Thus lower level officials, whose duties largely involve following detailed regulations, do not exercise a "discretionary function" as frequently as higher level policy-making officials who are engaged in determining what substantive regulations will be promulgated; the latter are primarily engaged in selecting among permissible choices. Because virtually all agency functions involve some choice making, these functions, unlike particular choices, cannot be classified in an either-or fashion as "discretionary" or "nondiscretionary." Thus, the determination of whether *functions* or *duties* in general are "discretionary" must be given substance by the particular policies underlying the legal rule using the term.

All of this fits together reasonably well in the absence of factual disputes. There is, however, no logical reason why the existence of factual disputes should disturb concepts of agency discretion. Although it may be unknown whether the person hired is seventeen or nineteen or whether the basis for hiring was a bribe, there are established fact-finding procedures to make such a determination and standards for reviewing findings of fact.⁴ Because theoretically there can be only one factual truth, exercising discretion is analytically distinct from the ascertainment of facts. There is no choice in a factual matter, but rather only the difficulty in determining what is the single answer because of conflicting or insufficient information.⁵

4. Some examples are de novo review and deference to the agency's factual determination.

5. Professor Davis suggests that the "full reality about discretion is somewhat more complex" in part because "discretion" may "include the judgment that goes into finding facts from conflicting evidence." Davis, *Discretionary Justice*, *supra* note 3, at 4-5. Although true, the point is consistent with the posited definition. If, in determining facts, the law because of limited or conflicting evidence permits an agency to choose which of several versions is true, an agency may be said to have discretion in determining facts. This is merely using "discretion" at a different level of analysis. If an agency has some choice in determining facts (or in determining law), it only has that choice in the presence of certain antecedent facts (and law). The antecedent (a) facts and (b) law in Professor Davis' example would be (a) the evidence presented and (b) the law of evidence and judicial review. Let us say that under the judicial review law of a jurisdiction (antecedent law), in the presence of conflicting expert testimony (antecedent facts), an agency may choose which facts to find within certain bounds. The deferential standard of review is in effect a grant of discretion in the finding of primary facts. In the presence of the primary facts it must be determined whether the primary law (the substantive law) gives

Similarly, there may be disputes over what the governing law provides. Disputes could arise regarding whether the law required an applicant to be twenty-one rather than eighteen, or whether holding a lottery is a proper legal basis for choice. Again, there are established means for making such determinations, such as legislative history or canons of construction. Although these methods may include deference to an agency's interpretation of the law, they are still consistent with the underlying theoretical axiom that there is ultimately only one proper interpretation of the law. Accordingly, discretion is analytically distinct from the ascertainment of governing law⁶ because the latter theoretically involves no choice.

Determinations of so-called "mixed" questions of law and fact,⁷ such as whether the applicant is a "citizen" within the meaning of the governing law, are also distinct from the exercise of discretion. Although the appropriate standard for determining a mixed fact-law issue may be elusive,⁸ the existence of only one factual truth and the existence of only one proper interpre-

the agency more than one choice. The exercise of choice in the fact finding process should not be confused with the exercise of choice once the facts are found.

The idea of agency choice of facts in the presence of insufficient or conflicting evidence may explain the use in some cases of an "abuse of discretion" scope of review for fact finding, where the substantial evidence standard is not appropriate. *See, e.g.,* APA, *supra* note 1, § 706(2)(A).

6. The law discussed here is the law limiting the agency's choice or the bases for its choice. Situations where the agency is the law-giver itself, as when it promulgates regulations, should be distinguished. Of course, an agency typically has discretion in determining which regulations to promulgate, and such regulations typically have the "force of law."

7. If it is uncertain whether a statutory term applies to a particular situation, occurrence, or item, one can argue the presence of a question of law, because a precise interpretation of the term—using, for instance, legislative history—would answer the question. One might also argue the presence of a fact question, because a careful examination of the situation, occurrence, or item—using, for instance, expert witnesses—could also answer the question. This is a classic "mixed law and fact" situation. *E.g.,* NLRB v. Yeshiva Univ., 444 U.S. 672 (1980) (whether faculty members at Yeshiva University were "managerial employees" under the statute). *Cf. Jaffe, Judicial Review, supra* note 3, at 242-47 (contending that the application of a statute in a given case is "not fact finding but law making" and hence is an inherently judicial function).

8. Compare NLRB v. Yeshiva Univ., 444 U.S. at 691 (administrative decision by the NLRB that Yeshiva University professors are not managerial employees under the NLRA overturned because decision, which involved "questions of law and fact," was not "rationally based on articulated facts and consistent with the Act"), with O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 508 (1951) (administrative finding that government employee's death occurred during course of employment upheld because the finding was not "unsupported by substantial evidence").

tation of the law require the conclusion that there is ultimately only one correct resolution of the mixed fact-law issue. Again, no choice is involved: the applicant either is a citizen or he is not.

The concept of discretion as defined here must be tested to determine whether it satisfactorily explains and reconciles the use of the term in the contexts in which it most frequently arises.

MANDAMUS

Since the early 1700s, mandamus to review agency action or inaction has been held to lie only to require ministerial, not discretionary, acts.⁹ The distinction has been roundly criticized as "undesirable, unworkable, and without practical justification."¹⁰ Much of the difficulty, however, may be resolved by carefully distinguishing between abusing discretion and exceeding discretion.

If discretion is abused, in the sense that a permissible choice is made for impermissible reasons, the action may nonetheless be deemed discretionary. If discretion is exceeded, in the sense that a legally impermissible choice is made, then the action that is required by law is nondiscretionary, or in this context, "ministerial."¹¹ Failure to make this distinction makes the cases hard to reconcile. A law journal survey quoted by a popular casebook states that federal courts

have adopted two approaches Under the first approach, the court makes the traditional determination of whether the alleged duty is ministerial or discretionary. If the duty is determined to be ministerial in nature, mandamus will issue. However, if the administrative action sought to be compelled is found to be discretionary, the court will find itself lacking

9. See *Work v. United States ex rel. Rives*, 267 U.S. 175, 177 (1925); *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 515 (1840); L. Jaffe, *Judicial Control of Administrative Action* 180-81 (1965); Jaffe & Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 Law Q.R. 345, 360 (1956).

10. K. Davis, *Administrative Law Treatise* § 23.11, at 356 (1958) (footnote omitted); L. Jaffe, *supra* note 9, at 181 ("unsound and unworkable").

11. Although the requirement to choose among permitted options is "ministerial," the choice among those options may remain "discretionary." For instance, if the law requires an agency to appoint a lawyer as an ombudsman, the agency has a ministerial duty to select a lawyer (as opposed to selecting no one, or selecting a layman); but the choice may be "discretionary" in that the agency may pick any lawyer.

[mandamus jurisdiction] In some of these decisions, courts have specifically indicated that the ministerial duty requirement precludes judicial review under [mandamus] *even if* an administrator *abuses* his discretion.

Under the second approach adopted by courts when construing the duty element for mandamus, the court first determines whether the duty alleged to be owed is ministerial or discretionary [E]ven if the duty is found to be discretionary, the court will further determine whether, by failing to perform the duty, the administrator exceeded the *permissible scope* of his discretion. The court will typically examine the statute granting the authority to the administrator, the congressional purpose, and other data such as the pertinent administrative regulations, in order to delineate the boundaries within which the officer may permissibly exercise his discretion; if these bounds are exceeded, mandamus will lie.¹²

The two "approaches" are however entirely consistent: abuse of discretion is not the same thing as exceeding the permissible scope of discretion.

The very cases used to exemplify the different "approaches" may be used to prove the consistency of the approaches. In *Yahr v. Resor*,¹³ cited as an example of the first approach, plaintiff soldiers brought an action for mandamus against the Secretary of the Army and the Commanding General of Fort Bragg, alleging that they were denied their first amendment right to hold public meetings and distribute anti-war materials on the military reservation.¹⁴ Denying jurisdiction under the federal mandamus statute,¹⁵ the court relied on the requirement that "the duty of the officer involved must be ministerial, plainly defined, and peremptory."¹⁶ Presumably, if the first amendment, a statute, or a regulation had required the allowance of public meetings, mandamus would have been appropriate. The court relied, however, on holdings that Army regulations permitting the denial of permission were constitutionally valid¹⁷; thus for some

12. Note, *Mandamus in Administrative Actions: Current Approaches*, 1973 Duke L.J. 207, 209-11 (emphasis in original), *quoted in* W. Gellhorn, C. Byse & P. Strauss, *Administrative Law: Cases and Comments* 926-27 (7th ed. 1979).

13. 339 F. Supp. 964 (E.D.N.C. 1972).

14. *Id.* at 966.

15. *Id.* at 967.

16. *Id.*

17. *Id.*

purposes the Commanding General could exclude the plaintiffs. The court accordingly reasoned that the General's actions could only be challenged for abuse, not for exceeding his discretion. Because "[m]andamus is not a proper remedy to challenge abuse of discretion," there was no jurisdiction under the federal mandamus statute.¹⁸

*Lovallo v. Froehlke*¹⁹ is cited as an example of the second approach. *Lovallo* involved a soldier who had been granted a writ of habeas corpus that had later been reversed on appeal. The soldier was put on leave during the pendency of the appeal. The Army ordered him to return to duty one day after his original three-year term would have expired.²⁰ In a subsequent mandamus petition suit, the Second Circuit held that the Army could exclude from the plaintiff's service the period between the original habeas corpus order and its reversal.²¹ The court also considered whether the Army's delay in recalling the plaintiff after the reversal was excessive. The court characterized the issue as whether "delaying the issuance of Army orders for three months . . . [w]as an abuse of discretion so gross . . . as to support" mandamus,²² but in effect its analysis was simply to determine if the Army exceeded its discretion. The court found that a three-month delay was understandable in view of the lack of a clear procedural regulation, but suggested that a delay of five or ten years might not be justified.²³ Thus, even if the law precluded long-delayed orders back to duty, it did not preclude orders delayed for only three months. The Army, therefore, had made a choice—to issue orders at the time it did—that the law permitted it to make, and not a choice—to issue the order five years later—that the law might preclude. This holding was a determination that the Army did not *exceed* its discretion—the proper issue in a mandamus suit.²⁴ Accordingly, there is no real inconsistency in the analyses of the two cases; each presumably would have ordered mandamus had discretion been exceeded

18. *Id.* The federal mandamus statute is codified at 29 U.S.C. § 1361 (1976).

19. 468 F.2d 340 (2d Cir. 1972), *cert. denied*, 411 U.S. 918 (1973).

20. *Id.* at 341-43.

21. *Id.* at 345.

22. *Id.* at 346.

23. *Id.*

24. Other cases described as "abuse of discretion" cases that may more helpfully be described as "exceeding discretion" cases are summarized in French, *The Frontiers of the Federal Mandamus Statute*, 21 Vill. L. Rev. 637, 649-54 (1976).

rather than abused.

Although there is a distinction between exceeding and abusing discretion, an argument can be made that it is not justified. In *Yahr*, for instance, if the Commanding General had prohibited plaintiffs from demonstrating on the post solely to limit their ability to express themselves, mandamus presumably still would not lie²⁵ as long as he could have forbidden demonstrations for legitimate reasons under the applicable regulations. Such a result might be justified, however, on the grounds that mandamus is an extraordinary writ involving judicial control of other branches of government. Thus, its use should be limited to correcting results that are contrary to the law, not to results that might be consistent with the law, even though the reasoning leading to the result is illegal or improper.²⁶

Moreover, if mandamus jurisdiction were held to permit review of abuses of discretion, as well as instances where discretion is exceeded, mandamus could be a basis for review of virtually every agency decision, because every decision involves a choice of some sort. The federal mandamus statute passed in 1962,²⁷ however, was not intended to provide a jurisdictional basis for

25. Mandamus would not lie even though the disputed act was based on unconstitutional grounds, because legitimate reasons could lead to that result. This explains the court's statement that allowing as a basis for federal mandamus jurisdiction the flat assertion that defendants have a duty not to violate the constitutional rights of plaintiffs "would be to stretch mandamus far beyond its proper limits." 339 F. Supp. at 967 (quoting *Fifth Ave. Peace Parade Comm. v. Hoover*, 327 F. Supp. 238, 243 (S.D.N.Y. 1971)).

26. *But see* L. Jaffe, *supra* note 9, at 181. Professor Jaffe suggests that mandamus is appropriate even in the latter case, with the relief being to "remit for the exercise of whatever discretion existed." *Id.* (footnote omitted). No example of such a use of mandamus is cited, but there is a reference to *Wieman v. Updegraff*, 344 U.S. 183 (1952). L. Jaffe, *supra* note 9, at 181.

Wieman invalidated an Oklahoma statutory requirement that state employees give a loyalty oath. A taxpayer sought to require state officials to stop paying salary to certain state college employees who refused to take the oath, and the college employees sought a mandatory injunction directing continued salary payment. Here there was no discretion on the part of the state officials: if the statute in question was constitutional, the law required no payment, but if the statute was unconstitutional, the law required payment. Even viewed as a review of the decision by the legislature to pass the legislation in the first place, *Wieman* was simply a determination that the legislature exceeded its discretion: it chose to pass a statute that the Federal Constitution did not permit. In contrast, an abuse of discretion issue in the *Wieman* context would have arisen if, for instance, the state college had the right to refuse to renew the contract of an untenured professor, and did so allegedly for the reason that the professor did not take the loyalty oath.

27. 28 U.S.C. § 1361 (1976).

review of agency action in all APA suits.²⁸ Otherwise, the amendment fourteen years later of the federal question jurisdiction statute,²⁹ eliminating the amount-in-controversy requirement in suits against federal agencies, which was intended to provide a general jurisdictional grant,³⁰ would have been unnecessary.

Another source of confusion is the mandamus requirement that the agency official's duty to act be "clear." If this requirement is taken to mean that the *analysis* that leads to the conclusion that there is a nondiscretionary legal duty must be free from doubt, then the requirement is, to use Professor Davis' terms, "exactly the opposite of what common sense requires":³¹

The special skills which the judges have by virtue of their training and experience may be brought into play when the interpretation is so "plain" that such skills are not needed, but may not be brought into play on the difficult problems of interpretation when the judges' skills are most needed.³²

A more logical interpretation of the "clear duty to act" requirement, however, is that it is essentially an alternative formulation of the ministerial-discretionary distinction.³³ In other words, if the law, once properly interpreted, gives the official no choice, the duty is "clear."

If this is so, an explanation is needed for why the "clear duty" requirement was ever formulated. In some circumstances the determination of what the applicable law is depends on how an agency interprets its own statute. Modern administrative law has had little difficulty in saying that, although a reviewing court has final authority to determine what the law is, it should often defer to an agency's statutory interpretation in making its determination.³⁴ Older judicial review cases, brought under the man-

28. See S. Rep. No. 1992, 87th Cong., 2d Sess. 2, reprinted in 1962 U.S. Code Cong. & Ad. News, 2784, 2784; K. Davis, *supra* note 10, § 23.10, at 804-06 (Supp. 1970); French, *supra* note 24, at 645-47.

29. Act of Oct. 21, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721 (1976) (amending APA, *supra* note 1, § 702).

30. See *Califano v. Sanders*, 430 U.S. 99, 105-06 (1977).

31. K. Davis, *supra* note 10, § 23.11, at 350.

32. *Id.*

33. W. Gellhorn, C. Byse & P. Strauss, *supra* note 12, at 925 n.8.

34. E.g., *CBS, Inc. v. FCC*, 453 U.S. 367, 382-84 (1981); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); see Woodward

damus rubric, accomplished the same result by saying that the agency had at times the "discretion" to interpret its own law. If the interpretation was clearly wrong, the court would overrule it; otherwise the court would defer to the agency's statutory interpretation under the guise of finding no "clear duty" on the part of the agency to select one statutory interpretation. In *Wilbur v. United States ex rel. Kadrie*,³⁵ for instance, certain children had sought mandamus to restore them to the rolls of an Indian tribe receiving federal distributions. The Interior Department, in 1919, on the advice of its Solicitor, enrolled the children, but in 1927 cancelled their enrollment on the basis of a later Solicitor's differing legal opinion.³⁶ The Supreme Court noted that the issues resolved by the Department were all questions of law requiring construction of the 1889 Act and other related acts.³⁷ The Court reasoned that "[w]here the duty is not . . . plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus."³⁸ The Court concluded that a reading of the relevant acts "shows that they fall short of plainly requiring that any of the questions be answered" differently from the answers of the Secretary of the Interior.³⁹ This result can be explained as an instance when the Court properly deferred to the Secretary's construction of his own statute.

In a similar case several years earlier, Chief Justice Taft, discussing mandamus, explained: "Under some statutes, the discretion extends to a final construction by the officer of the statute he is executing. No court in such a case can control by mandamus his interpretation, even if it may think it erroneous."⁴⁰ While this statement may go too far by suggesting that a court must sometimes uphold an erroneous statutory interpretation, the Court examined the statutory text and legislative history of the particular statute to determine whether the agency's inter-

& Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 Ad. L. Rev. 329, 331-36 (1979); Jaffe, *Judicial Review*, *supra* note 3, at 258-76.

35. 281 U.S. 206 (1930).

36. *Id.* at 214.

37. *Id.* at 221.

38. *Id.* at 219 (footnote omitted).

39. *Id.* at 221.

40. *Work v. United States ex rel. Rives*, 267 U.S. 175, 177 (1925).

pretation was "wholly at variance with the natural and necessary meaning of the words."⁴¹ In concluding that it was not, the Court distinguished cases in which "the statutory direction . . . was clear and positive and it was not left to the Secretary . . . to vary it, *i.e.*, he was not given discretion finally to construe it."⁴² Thus the "clear duty" requirement, at least in federal mandamus cases, was not used to require that the legal analysis be clear, but rather that the case not be one where deference to an agency's interpretation of its own statute was required. As the Third Circuit has more recently stated, "[I]f mandamus jurisdiction were unavailable because, prior to ruling on the merits, the Secretary's duty is not clear, then a court would never have jurisdiction to determine *whether* his duty was clear in the first place."⁴³

Similar logic would apply to a determination of fact: the clarity of the facts should not determine whether mandamus jurisdiction is appropriate. The appropriate scope of review of factual determinations in mandamus cases may be disputed,⁴⁴ but once the facts, as well as the law, are determined, the duty is either "ministerial"- "nondiscretionary"- "clear," or it is not.⁴⁵

Thus it appears that a meaningful use of the term "discretion," distinguishing between abusing and exceeding discretion, makes more sense of mandamus law. One could argue that in *either* case the courts should be able to review agency actions. That argument is accepted in most cases for federal agencies because the APA grants a cause of action where mandamus would otherwise be required.⁴⁶ The federal mandamus statute is no longer necessary as an independent jurisdictional basis,⁴⁷ because the federal question jurisdiction statute no longer requires

41. *Id.* at 181.

42. *Id.* at 183.

43. *Mattern v. Weinberger*, 519 F.2d 150, 157 (3d Cir. 1975) (emphasis in original) (footnote omitted), *vacated on other grounds sub nom. Mathews v. Mattern*, 425 U.S. 987 (1976). *See also* *Frost v. Weinberger*, 515 F.2d 57, 62 (2d Cir. 1975), *cert. denied*, 424 U.S. 958 (1976).

44. *See, e.g.*, L. Jaffe, *supra* note 9, at 188-92.

45. *See* Moskowitz, *Spinning Gold into Straw: The Ordinary Use of the Extraordinary Writ of Mandamus to Review Quasi-Legislative Actions of California Administrative Agencies*, 20 Santa Clara L. Rev. 351, 370-71 (1980).

46. APA, *supra* note 1, § 703.

47. K. Davis, *supra* note 10, § 23.09-1, at 391-92 (2d ed. Supp. 1982); W. Gellhorn, C. Byse & P. Strauss, *supra* note 12, at 929-30.

a particular amount in controversy,⁴⁸ and thus provides a jurisdictional basis for review of virtually⁴⁹ all federal agency action.

UNREVIEWABILITY

A more relevant test of the proposed interpretation of "discretion" comes from the provision of the APA that provides for judicial review, except "to the extent that . . . agency action is committed to agency discretion by law."⁵⁰ There is an apparent conflict between this exception and the scope of review provision of the APA: "The reviewing court shall . . . set aside agency action . . . found to be . . . an abuse of discretion."⁵¹

Interpretation of the meaning of these provisions was the subject of a protracted and heated debate between Raoul Berger and Kenneth Culp Davis.⁵² No purpose would be served by evaluating the points made in that dispute. It may be noted, however, that the apparent conflict between the two statutory provisions can be resolved by use of the suggested definitions.⁵³ Berger argues that unless another statute precludes review under section 701(a)(1) of the APA, any abuse of discretion is reviewable.⁵⁴ He draws a distinction between "abuse of discretion" and "discretion" to conclude that the "committed to

48. See *supra* note 29 and accompanying text.

49. In most Social Security Act cases, federal question jurisdiction is precluded as a basis for review. 42 U.S.C. § 405(h) (1976); *Califano v. Sanders*, 430 U.S. 99, 105-07 (1977). Mandamus jurisdiction also appears to be precluded by 42 U.S.C. § 405(h) (1976). Rogers, *A Way Out of the Social Security Jurisdiction Tangle*, 21 *Ariz. L. Rev.* 689, 714-16 (1979).

50. APA, *supra* note 1, § 701(a)(2).

51. *Id.* § 706(2)(A).

52. 4 K. Davis, *supra* note 10, § 28.16 (Supp. 1965); Berger, *Administrative Arbitrariness and Judicial Review*, 65 *Colum. L. Rev.* 55 (1965) [hereinafter cited as Berger, *Administrative Arbitrariness*]; Berger, *Administrative Arbitrariness—A Rejoinder to Professor Davis' "Final Word,"* 114 *U. Pa. L. Rev.* 816 (1966) [hereinafter cited as Berger, *Rejoinder*]; Berger, *Administrative Arbitrariness—A Reply to Professor Davis*, 114 *U. Pa. L. Rev.* 783 (1966) [hereinafter cited as Berger, *Reply*]; Berger, *Administrative Arbitrariness: A Sequel*, 51 *Minn. L. Rev.* 601 (1967) [hereinafter cited as Berger, *Sequel*]; Berger, *Administrative Arbitrariness: A Synthesis*, 78 *Yale L.J.* 965 (1969) [hereinafter cited as Berger, *Synthesis*]; Davis, *Administrative Arbitrariness—A Final Word*, 114 *U. Pa. L. Rev.* 814 (1966) [hereinafter cited as Davis, *Final Word*]; Davis, *Administrative Arbitrariness—A Postscript*, 114 *U. Pa. L. Rev.* 823 (1966) [hereinafter cited as Davis, *Postscript*]; Davis, *Administrative Arbitrariness is Not Always Reviewable*, 51 *Minn. L. Rev.* 643 (1967) [hereinafter cited as Davis, *Is Not Always*].

53. See *supra* text accompanying notes 4-6.

54. Berger, *Administrative Arbitrariness*, *supra* note 52; Berger, *Synthesis*, *supra* note 52.

agency discretion" language merely precludes review of proper exercises of agency discretion.⁵⁵ The difficulty with this explanation is that if the "committed to agency discretion" exception applies, by definition, only to proper exercises of discretion, it would serve little purpose. Proper choices would be upheld anyway. In contrast, Davis argues that the two provisions, when read together, have a meaning that is "extremely unclear, because the two oppose each other."⁵⁶ He concludes that, on the basis of legislative history, policy, and case law, in some instances, there is no court review of abuses of agency discretion.⁵⁷

The two provisions can be reconciled, however, without making either one surplusage. To commit to agency discretion means that the law, either constitutional, statutory, or common, permits the agency's choice to be made on *any* basis.⁵⁸ If an agency can make a decision or choice for any reason, without justification, the agency's action is not only within its discretion, but is committed to the agency's discretion. If the law gives the agency complete freedom to choose within the boundaries of its discretion, judicial review of the agency's action or decision is not warranted. That is precisely what section 701 of the APA says: Judicial review applies, "except to the extent that . . . agency action is committed to agency discretion by law."⁵⁹ Consistent with this language, when action is *not* committed to agency discretion—that is, when the law tells the agency what to

55. Berger, *Synthesis*, *supra* note 52, at 60-61; Berger, *Reply*, *supra* note 52, at 788-89.

56. Davis, *Postscript*, *supra* note 52, at 824.

57. *Id.* at 831. Professor Davis gives the following as examples of instances where review might be precluded:

the President's appointment to a federal court in Massachusetts of one thought by some to be unqualified; a warden's assignment of a prisoner to a cell in the old and unpleasant part of the prison; an FBI agent's choice of an old enemy for investigation when the facts and circumstances surrounding five others who might be investigated are the same; the President's refusal of a pardon; a secret service agent's choice not to make an arrest that might properly be made; a decision by the Antitrust Division of the Justice Department to bring a proceeding against one company when half a dozen others would also be appropriate defendants; an antipoverty worker's decision denying use of government money to straighten a woman's teeth; a prosecutor's refusal to make a deal for a lesser charge in return for a plea of guilty.

Id. at 832.

58. See the use of the word "committed" in *Peterson v. Rivers*, 350 F.2d 457, 458 (D.C. Cir. 1965), and in *Richardson v. Rivers*, 335 F.2d 996, 999 (D.C. Cir. 1964).

59. APA, *supra* note 1, § 701(a)(2).

consider when making its choice—one basis for review should be whether the agency has abused its discretion, specifically, whether the agency has made a choice on a basis that the law does not allow.

This reading of the APA reconciles the two provisions without rendering the “committed to agency discretion” exception of no effect. It is also consistent with the Supreme Court’s opinion in *Citizens to Preserve Overton Park, Inc. v. Volpe*,⁶⁰ holding that the exception is “very narrow” and is applicable only when there is “no law” to apply.⁶¹ In *Overton Park* the issue was whether the Secretary of Transportation should have approved the routing of an interstate highway through a municipal park in Memphis, Tennessee. If there were no grounds upon which the Secretary was legally required to make his decision, the decision would arguably have been committed to his discretion.⁶² The Court found instead that the statute did govern what factors should be considered in making the decision.⁶³ The Court found, for instance, that under the statutes “protection of parkland was to be given paramount importance.”⁶⁴ In its subsequent discussion of what constitutes an abuse of discretion, the Court said a reviewing court “must consider whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”⁶⁵ The Court thus performed a two-step analysis, which conforms precisely to the interpretation of the APA posited here: (1) Does the law govern the factors to be weighed in exercising discretion, or is the action “committed to agency discretion,” and (2) If the law does state that some factors may or may not be considered, was the decision based on legally improper factors and therefore an “abuse of discretion.”

Of course, as a preliminary matter, it must be determined whether the particular choice was within the scope of the discretion.⁶⁶ If not, the chosen decision could not have been commit-

60. 401 U.S. 402 (1971).

61. *Id.* at 410 (citation omitted).

62. *See* *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 455-56 (1979); *Jaymar-Ruby, Inc. v. FTC*, 651 F.2d 506, 510-12 (7th Cir. 1981).

63. 401 U.S. at 411-13.

64. *Id.* at 412-13.

65. *Id.* at 416.

66. *Id.* at 415-16.

ted to agency discretion at all.⁶⁷ In APA terms, the reviewing court must set aside action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."⁶⁸ Thus, if the statute in *Overton Park* had precluded approval of highways through any municipal park, the decision would have *exceeded* the Secretary's discretion, and appropriately would have been reversed for that reason.

The real difficulty is determining when the law actually does commit action to agency discretion. But this determination is not a problem with the discretion concept itself as expressed in the APA; it is rather a difficulty in determining what actions the "law" allows to be based on any factor.⁶⁹ Unreviewability of agency determinations typically occurs in areas where separation of powers considerations are important, such as military orders,⁷⁰ foreign affairs,⁷¹ and exercises of prosecutorial discretion.⁷² In such cases, the constitutionally based policy of permitting the executive to act effectively, and therefore in some cases to act without judicial supervision, may require a holding that agency officials, such as an army commander making an assignment, may act on what might otherwise be a legally impermissible ground, such as malice. The commander in this case would not be abusing his discretion, because he would be permitted to act on any basis.⁷³

67. See *National Ass'n of Postal Supervisors v. United States Postal Serv.*, 602 F.2d 420, 432-33 (D.C. Cir. 1979).

68. APA, *supra* note 1, § 706(2)(C).

69. A thorough analysis of when the law will permit agency action to be so free is beyond the scope of this article. Some suggested analyses may be found in *Hahn v. Gottlieb*, 430 F.2d 1243, 1249-51 (1st Cir. 1970), and *Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 Harv. L. Rev. 367 (1968).

70. *E.g.*, *Karlin v. Reed*, 584 F.2d 365 (10th Cir. 1978); *Appelwick v. Hoffman*, 540 F.2d 404, 406 (8th Cir. 1976); *Ornato v. Hoffman*, 546 F.2d 10, 14 (2d Cir. 1976); *United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371 (2d Cir. 1968) (referring explicitly to § 701(a)(2) of the APA at 375 n.2), *cert. denied*, 394 U.S. 929 (1969); see also *Orloff v. Willoughby*, 345 U.S. 83 (1953).

71. *E.g.*, *Braniff Airways v. CAB*, 581 F.2d 846 (D.C. Cir. 1978) (continuing to follow *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948)).

72. *E.g.*, *George Banta Co. v. NLRB*, 626 F.2d 354, 356-57 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); *Associated Builders and Contractors v. Irving*, 610 F.2d 1221, 1226-28 (4th Cir. 1979), *cert. denied*, 446 U.S. 965 (1980); *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967) (Burger, J.). But see *Dunlop v. Bachowski*, 421 U.S. 560 (1975); *Davis, Discretionary Justice, supra* note 3, at 188-214.

73. The army commander, however, could not assign a soldier to commit an illegal act such as murder; that would exceed his discretion.

Because the policy behind a law permitting action on any ground may be in part to avoid judicial interference with some executive functions, one might say that there are instances when an abuse of discretion is not reviewable.⁷⁴ Such terminology would make the APA provisions seem contradictory. It is clearer to say that the agency is not abusing its discretion because to permit a choice for any reason is to "commit" the decision to agency discretion.

Courts may be reluctant to say that a decision, even a military assignment, can be based upon *any* ground.⁷⁵ Thus, in dicta, courts have asserted the power to review actions otherwise deemed unreviewable, if the basis of the decision is a judicially suspect one, such as race.⁷⁶ Here the constitutional equal protection policy becomes so strong as to overcome the separation of powers considerations. How then can it be said that certain agency action is both committed and not committed to agency discretion? An answer would be that an agency action can be partially, but not totally, committed to agency discretion. This reading is consistent with the APA provision that review is provided for "except to the extent that . . . action is committed to agency discretion by law."⁷⁷ Additionally, the idea is consistent with the assertion that "committed to agency discretion" merely means that an agency can use any basis for choice within the scope of its discretion. Thus, in the absence of evidence that a decision was based on a constitutionally suspect ground like race, it is perfectly logical to say that the action was committed to agency discretion, although, in the presence of such a ground, the action may not be so described.

In summary, the suggested interpretation of "committed to agency discretion" as meaning any *basis* for the agency action is permissible reconciles the statutory provision for unreviewability

74. *E.g.*, Davis, *Postscript*, *supra* note 52, at 832.

75. *Cf.* Berger, *Synthesis*, *supra* note 52, at 995-97 (contesting the view of Prof. Davis that military decisions involving alleged arbitrariness are—or should be—immune from judicial review in virtually every circumstance).

76. *Wallace v. Chappell*, 661 F.2d 729, 737 (9th Cir. 1981), *cert. granted*, 103 S. Ct. 292 (1982); *Mindes v. Seaman*, 453 F.2d 197, 199 (5th Cir. 1971). A frequent, albeit circular, expression of this reservation of power is that action otherwise unreviewable may be reviewed if it is "so arbitrary and irrational that it cannot stand." *Roth v. Laird*, 446 F.2d 855, 856 (2d Cir. 1971) (quoting *Feliciano v. Laird*, 426 F.2d 424, 427 (2d Cir. 1970)); *see also* *Appelwick v. Hoffman*, 540 F.2d 404, 406 (8th Cir. 1976).

77. APA, *supra* note 1, § 701(a)(2) (emphasis added).

with the provision for review of abuses of discretion without rendering either provision mere surplusage. It also permits the courts to refuse to review certain types of quintessentially executive activities without precluding the possibility of review of those functions when certain constitutionally suspect categories are involved.

TORT SUITS AGAINST OFFICIALS AS INDIVIDUALS

The use of the term "discretion" causes the most confusion in the area of tort law. Discretion, defined as a range of legally permissible choices, is not a concept of much use in tort law. For most torts, the law either permits an action or inaction or it does not, without reference to the *reasoning* of the actor.⁷⁸ How a person decided to take or to omit to take certain action does not determine whether the standard of care was violated.

For instance, suppose A is driving an automobile at night in the rain at a speed of forty miles per hour. The posted speed limit is forty-five miles per hour. The road is slippery and there is a lot of traffic. An accident occurs that would not have occurred if A had been driving more slowly. The issue in determining whether A was negligent may be phrased in Judge Learned Hand's formula⁷⁹ as whether the burden on A of driving more slowly was less than the probability of harm to others times the extent of possible loss to those others. One could debate at length whether this issue is one of fact or of law;⁸⁰ nonetheless, the conclusion follows that A was either at fault driving forty miles per hour in these circumstances or he was not. Tort law does not contemplate more than one answer to this question based upon the reasons A used in deciding whether to drive at forty miles per hour. His action was either negligent or not, re-

78. Although the inquiry in a negligence case is what a *reasonable person under the circumstances* would have done, and thus reasoning is important, the decision is only whether a reasonable person would have committed the offending act or whether he would not have. If a reasonable person would not have regarded the act or omission as imprudent, there is no liability for negligence, regardless of the motives or reasoning of the actual defendant.

79. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); *Restatement (Second) of Torts* §§ 291-293 (1965).

80. See *Pokora v. Wabash R. Co.*, 292 U.S. 98, 105-06 (1934); *Famous Knitwear Corp. v. Drug Fair, Inc.*, 493 F.2d 251, 253 n.2 (4th Cir. 1974) (collecting cases); *Hicks v. United States*, 368 F.2d 626, 631 (4th Cir. 1966); *O. Holmes, The Common Law* 120-29 (1881).

ardless of whether he drove at forty for a good reason (*e.g.*, to maximize safety), for a bad reason (*e.g.*, to get to his destination sooner), for no reason at all, or for a totally illogical reason (*e.g.*, racial animosity).⁸¹ It might be difficult to decide whether driving at forty was negligent as a matter of fact. For example, there may not have been enough witnesses or highway experts. It also might be difficult to determine whether driving at forty was negligent as a matter of law; there may be no relevant cases. But such difficulties do not affect the basic premise that the activity was ultimately either negligent or not, regardless of the reasoning leading to it.

A similar point can be made with most common law intentional torts. "Intent" in assault, battery, or false imprisonment means substantial certainty on the part of the actor that a particular type of harm will occur.⁸² Generally it does not refer to the motive or to the reasoning that prompts a particular act. Thus touching without consent will be a battery even if the defendant was trying to help the plaintiff.⁸³ Only in a very few instances does the determination of whether activity is tortious⁸⁴ depend upon the underlying reason for the actor's choice of conduct.⁸⁵

Accordingly, it makes little sense to talk of "discretion" at all when speaking of such common law torts. *Actions* either exceed the limits permitted by tort law or they do not. If they do not, the actor's choice may be one of numerous acceptable possibilities. In that sense, his choice is an exercise of discretion, but only in the sense that *any* action, as a choice of one of many possibilities, is an exercise of discretion. In the negligence example, if A's driving at forty was not negligent, he could also have driven at thirty-eight or thirty-five. To say that he was exercising his discretion to drive at forty rather than thirty-eight or

81. See W. Prosser, *Handbook of Law of Torts* § 31, at 145 (4th ed. 1971).

82. See *id.* § 8, at 31; Restatement (Second) of Torts § 13 comment c (1965).

83. *E.g.*, *Clayton v. New Dreamland Roller Skating Rink*, 14 N.J. Super. 390, 82 A.2d 458, 462 (1951).

84. Other elements needed to make activity "tortious," such as duty, causation, and damages, are assumed.

85. Examples are common law torts where malice is an element, such as malicious prosecution, see W. Prosser, *supra* note 81, § 119, at 835, 847-49; and torts where a good faith privilege is a defense, such as libel of public persons, *e.g.*, *New York Times v. Sullivan*, 376 U.S. 254 (1964).

thirty-five would be accurate, but not legally relevant.

This reasoning generally would apply even if the actor were the government. Thus if A were a Postal Service truck driver, his action would be evaluated as violative of the tort standard without reference to his motives. Similarly, if the government employee were a doctor amputating a leg, the operation would be judged by the standard of care of medical malpractice cases without regard to his motive.

In some cases, however, particularly when the government is the actor, the reasoning that leads to an act will determine whether it is tortious. Perhaps the most frequent situation is when a government official does something that would be a tort if done by a private person, but which is permitted under the applicable law if done by a government official in a *lawful* manner. The issue then becomes whether the official's action is lawful, and the question of abuse of discretion is raised. *Gregoire v. Biddle*⁸⁶ is the classic example of the use of official immunity to preclude such an inquiry into an official's motives. Gregoire sued two successive United States Attorneys General and three subordinate officials for false imprisonment. He had been arrested as an enemy alien during World War II and held in custody for over four years, until released by court order on a finding that he was French, not German. Gregoire asserted that the defendants held him not because they believed he was German, but rather on the basis of a malicious and wilful conspiracy.⁸⁷ The detention presumably would have been privileged if the defendants reasonably believed that Gregoire were German,⁸⁸ but not if the defendants acted "for any . . . personal motive not connected with the public good."⁸⁹ Thus whether the activity was tortious depended upon whether the agency officials abused their discretion by acting on the basis of illegal motives—in this case, bad faith.

It is in this situation, where resolution of the tort claim would require a challenge to the motive of the agency officials, that the doctrine of official tort immunity makes the most sense.

86. 177 F.2d 579 (2d Cir. 1949).

87. *Id.*

88. Restatement (Second) of Torts § 121(b) (1965); 1 F. Harper & F. James, *The Law of Torts* § 3.18, at 277 (1956).

89. 177 F.2d at 581.

As Judge Learned Hand explained, the justification for denying recovery

is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith.⁹⁰

This explanation applies when the actor's motivation is a determining factor in ascertaining tort liability. For example in a typical negligence case arising from an automobile accident or medical malpractice, the motivation of the actor is irrelevant. There still may be a burden of satisfying a jury of certain facts, but the legitimacy of the reasoning process—"his good faith"—is not in issue.

Thus there are two different types of government tort cases: (1) cases in which the nature of the motivation or reasoning determines tort liability, and Learned Hand's policy strongly favors immunity, and (2) cases in which no motivation or reasoning can justify the act, and the policy bases for immunity are not present. This distinction is reflected in the statement that officers who perform "ministerial," as distinguished from "discretionary," tasks have no immunity for their torts.⁹¹ Although the distinction between ministerial and discretionary may be criticized for the same reasons asserted in the mandamus context,⁹²

90. *Id.* Judge Hand continued:

There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

Id.

91. Restatement (Second) of Torts § 895D comment h (1979); K. Davis, *supra* note 10, § 26.16, at 437 (2d ed. Supp. 1982).

92. See *supra* text accompanying note 10; *Ham v. County of Los Angeles*, 46 Cal. App. 148, 162, 189 P. 462, 468 (1920); L. Jaffe, *supra* note 9, at 240; Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 Nw.

it is useful in both contexts.⁹³ It explains, for example, the courts' efforts to find liability for negligent government doctors, despite the doctors' exercise of discretion at all relevant times in selecting from among various non-negligent modes of treatment. The attempt has been made to distinguish between "governmental" discretion on the one hand, and "medical" or "professional" discretion on the other.⁹⁴ Such a distinction is logically elusive. How can one say that an army doctor is not performing a government function? A sounder basis for finding liability is that acting in a nonnegligent fashion is a ministerial duty in the sense that it is nondiscretionary: the negligent act is precluded under tort law regardless of the reasoning or motivation.⁹⁵ Ac-

U.L. Rev. 526, 531 n.28 (1977).

93. It should be noted that the effect of the distinction may not be the same in the tort context as in the mandamus context on the facts of a particular case. Professor Jaffe notes that "a licensing officer who improperly denies a license is not liable at common law for the injuries suffered from the date of wrongful refusal, although he may be commanded in mandamus to grant the license." L. Jaffe, *supra* note 9, at 240 (footnote omitted). This may be a perfectly rational result applying the ministerial-discretionary distinction. The reasoning of the officer makes no difference *under the licensing law*, so the officer has a ministerial duty to grant the license, enforceable by mandamus. But the reasoning of the officer in failing to perform a ministerial duty may be highly relevant in determining whether the action was privileged *as a matter of tort law*.

In two of the three cases cited by Professor Jaffe there is no indication that mandamus would have been a proper remedy for denial of the license. See *Meinecke v. McFarland*, 122 Mont. 515, 206 P.2d 1012, 1014 (1949) (no allegation of a "statutory obligation on the part of the public officer"); *Bassett v. Godschaal*, 95 Eng. Rep. 967, 968 (1770) ("the plaintiff here has no right to have a license"). In the third case cited it is clear that a violation exceeding the bounds of the licensing law does not necessarily mean that the bounds of tort law have been exceeded:

It is conceivable that an honest mayor, overzealous for the public welfare, might from entirely pure and upright motives take action in order to accomplish ends regarded by him as highly desirable which might be so described If and when such error may be corrected by mandamus, the motives of such public officer ought not to be ignored and his zeal punished by making him liable in an action of tort.

Jaffarian v. Murphy, 280 Mass. 402, 405, 183 N.E. 110, 112 (1932).

94. *Davis v. Knud-Hansen Memorial Hosp.*, 635 F.2d 179, 186 (3d Cir. 1980); *Jackson v. Kelly*, 557 F.2d 735, 738-39 (10th Cir. 1977); *Henderson v. Bluemink*, 511 F.2d 399, 403 n.24 (D.C. Cir. 1974); see K. Davis, *supra* note 10, §26.16, at 437-39 (2d ed. Supp. 1982).

95. Although the Supreme Court in *Procunier v. Navarette*, 434 U.S. 555 (1978), found a qualified immunity to a § 1983 claim asserting negligent deprivation of constitutional rights, the decision is better rationalized as a determination that the defendants were not negligent as a matter of law because their acts were not unreasonable. Sowle, *Qualified Immunity in Section 1983 Cases: The Unresolved Issues of the Conditions for Its Use and the Burden of Persuasion*, 55 Tul. L. Rev. 326, 341-49 (1981). See Restatement (Second) of Torts § 895D comment e (1979).

cordingly, the “ministerial-discretionary” distinction is useful in explaining when official immunity as asserted in *Gregoire* should apply.

However, the “ministerial-discretionary” distinction—based upon whether the particular act may be attacked on the basis of the motive alone—does not explain cases denying immunity to lower level law enforcement officers.⁹⁶ Frequently such officers will take actions that would be privileged absent bad faith motivation.⁹⁷ The courts nonetheless have been reluctant to grant absolute immunity in such cases. To reach a no-immunity result, the courts have referred to the duties of the officer as “not discretionary.”⁹⁸ The focus, however, is not on the particular *act* that is the basis of the suit, but rather on the general nature of the *duties* that the officer performs.⁹⁹ Even though a police officer makes many decisions that depend for their legitimacy on the motives of the officer, his duties in general are governed by extensive regulations and guidelines. Arguably, it follows that the public’s interest in having such officers exercise their discretion in an unfettered manner is not as great as the need for discretion in officials who decide issues based on broader public policy considerations.¹⁰⁰

A second way of rationalizing the distinction is to reason that a police officer is not making “law” nearly so much when he decides whether to make a particular search or a particular arrest as is a United States Attorney in deciding to pursue a particular prosecution or an agency official in promulgating a particular substantive rule or regulation.¹⁰¹ The greater the effect

96. See L. Jaffe, *supra* note 9, at 240.

97. *E.g.*, *Pierson v. Ray*, 386 U.S. 547, 555-58 (1967); *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339, 1347-48 (2d Cir. 1972). On the exercise of discretion by policemen, see Davis, *Discretionary Justice*, *supra* note 3, at 81-84.

98. *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339, 1346 (2d Cir. 1972) (collecting cases and authorities).

99. *Id.* at 1346-47; *Galella v. Onassis*, 487 F.2d 986, 994 n.9 (2d Cir. 1973). Sometimes the focus is not on the nature of the duties, but on other factors, such as the nature of the interest protected by the tort. See *Sami v. United States*, 617 F.2d 755, 772 (D.C. Cir. 1979) (distinguishing “discretion” for purposes of immunity from defamation from “discretion” for purposes of immunity from false arrest on the ground that the latter involves more encroachment on personal liberty).

100. See Restatement (Second) of Torts § 895D comments d & f (1979).

101. *Accord Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 403-06 (1979) (members of interstate planning commission immune from civil rights actions arising out of legislative choices).

the official's decision has on the public, the greater the public interest is in ensuring that the decisions are made without the fear of burdensome lawsuits.

The importance of this analysis is not so much to examine the validity of the reasoning that some types of duties do not warrant immunity, as it is to emphasize that the term "discretionary" now is being used in a different sense. Instead of being used to refer to particular *acts* to determine whether those acts are challenged for their reasoning or motivation, the term is used to refer to the general *duties* or *functions* of the official to make decisions involving the balancing of public policy considerations.

In addition to the requirement for immunity that the official's *action* be discretionary as opposed to ministerial and the requirement that *duties* involve public policy determinations, there is a more obvious requirement—that the action be an official action.¹⁰² If a mailman arrests someone or a Public Health Service doctor issues a press release accusing a corporation of securities fraud, he is simply not acting in his official status. The fact of public employment is irrelevant to an alleged tort arising out of the unauthorized action. Accordingly, the policy basis for official immunity—to encourage, or at least to permit, vigorous administrative action—does not apply. Thus, immunity should not apply to acts beyond the scope of an official's authority. When Congress has statutorily provided that a certain government employee shall be immune, it has required that such an employee be "acting within the scope of his office or employment."¹⁰³

The requirement that the action be discretionary, as opposed to ministerial, is analytically distinct from the requirement that the action be within the scope of the official's duties. In *Gregoire*, Judge Hand was rather explicit in making this distinction:

The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never

102. See Restatement (Second) of Torts § 895D comment g (1979).

103. 28 U.S.C. § 2679(b) (Supp. III 1979).

cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him.¹⁰⁴

In adopting the logic of *Gregoire in Barr v. Matteo*¹⁰⁵ a decade later, the Supreme Court found a government official immune where the privilege defense to a common law tort depended upon the good faith of the official. The plaintiffs, former employees of the Office of Rent Stabilization, were allegedly libelled by the Director's issuance of a press release explaining his reasons for discharging them. The Supreme Court held that the Director's remarks were absolutely privileged.¹⁰⁶

Unfortunately, in its analysis the Supreme Court did not adequately distinguish the separate requirements for official immunity. In four central paragraphs, the plurality opinion failed to make clear when it had stopped discussing "discretion" and started analyzing scope of duty. In the first of these paragraphs, the Court noted that presence of official immunity did not depend on the rank of the officer.¹⁰⁷ In the second paragraph, the Court stated that the duties entrusted to an officer provide the guide in delineating the scope of official immunity: occasions of immunity are "broader" if the range of responsibilities and duties is broader and the scope of discretion is wider.¹⁰⁸ In the third paragraph, the Court said that when these standards were applied to the delegated powers of the official and his agency's practice, the press release

was an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function

104. *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

105. 360 U.S. 564 (1959).

106. *Id.* at 574. The opinion of Justice Harlan was joined by only three other justices. Justice Black's concurrence does not contradict the plurality opinion on any particular basis, and Justice Harlan was able, in the companion case of *Howard v. Lyons*, 360 U.S. 593 (1959), to issue an opinion of the Court following the *Barr* decision. *Id.* at 597-98.

107. 360 U.S. at 572-73.

108. *Id.* at 573-74.

effectively. It would be an unduly restrictive view of the scope of the duties of a policy-making executive official to hold that a public statement of agency policy in respect to matters of wide public interest and concern is not action in the line of duty.¹⁰⁹

Finally, in the last of these central paragraphs, the Court held that the action's being "within the outer perimeter of petitioner's line of duty" was enough for immunity, despite allegations of malice.¹¹⁰ Thus, in its discussion of the law, the Court seemed to set out the discretionary duties distinction, but in applying the law to the facts, the Court seemed to discuss the "scope of duties" question. Many lower courts had little difficulty reading back into *Barr* the distinct requirements (a) that the official's duties be "discretionary" in nature, and (b) that the official's actions be within the outer perimeter of his scope of authority or line of duty.¹¹¹

However, the Supreme Court's reasoning in *Barr* came back to haunt sound analysis in *Butz v. Economou*.¹¹² After an unsuccessful Department of Agriculture proceeding to revoke or suspend the registration of his commodities futures commission company, Economou sued various Agriculture Department officials alleging that by instituting unauthorized proceedings against him they had violated his constitutional rights.¹¹³ The Court held that only a qualified immunity¹¹⁴ from damage liabil-

109. *Id.* at 575.

110. *Id.*

111. *Sami v. United States*, 617 F.2d 755, 768 n.23 (D.C. Cir. 1979); *G.M. Leasing Corp. v. United States*, 560 F.2d 1011, 1013-14 (10th Cir. 1977); *Green v. James*, 473 F.2d 660, 661-62 (9th Cir. 1973); *Johnson v. Alldredge*, 488 F.2d 820, 824 (3d Cir. 1973), *cert. denied*, 417 U.S. 882 (1974); *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339, 1342-43 (2d Cir. 1972).

112. 438 U.S. 478 (1978).

113. *Id.* at 481-83.

114. Qualified immunity means liability only for malicious actions intended to cause harm or for action the officer knew or should have known would have illegally caused injury. Absolute immunity, in contrast, means that an officer may not be liable in his individual capacity even for unreasonable or malicious actions in bad faith. K. Davis, *supra* note 10, § 26.15, at 436 (2d ed. Supp. 1982). For practical purposes the term qualified immunity is a misnomer. "Immunity" implies that the defendant will not be subject to suit; the purpose is to prevent the official from having to contend with the burden of defending lawsuits. *E.g.*, *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949). This purpose is largely fulfilled if suits can be dismissed on motions for summary judgment—an easy possibility in absolute immunity cases. The purpose is largely unfulfilled when the official is required to litigate the issue of bad faith before determining whether the immunity applies in the first place. See 438 U.S. at 527 (Rehnquist, J., concurring in part and dissenting in part); Schuck, *Suing Our Servants: The Court, Congress, and the Lia-*

ity was available for executive officials charged with *constitutional* violations.¹¹⁵ Nevertheless, the Court held that agency officials who perform functions analogous to those of a judge or prosecutor are entitled to absolute immunity.¹¹⁶

Finding an absence of absolute immunity for constitutional torts, the *Economou* Court reasoned that *Spalding v. Vilas*,¹¹⁷ an 1896 case granting immunity to the Postmaster General for circulating an allegedly libelous notice among his postmasters, "did not involve conduct manifestly or otherwise beyond the authority of the official, nor did it involve a mistake of either law or fact in construing or applying the statute. It did not purport to immunize officials who ignore limitations on their authority imposed by law."¹¹⁸ The Court drew the negative inference that "the official would not be excused from liability if he failed to observe obvious statutory or constitutional limitations on his powers or if this conduct was a manifestly erroneous application of the statute."¹¹⁹

The *Economou* Court continued by stating that *Barr* was similar to *Spalding*, and unlike the *Economou* case, because the defendants in *Barr* had not "violated those fundamental princi-

bility of Public Officials for Damages, 1980 Sup. Ct. Rev. 281, 325-27. Thus, despite the Supreme Court's use of the qualified good faith-reasonable belief "immunity" in *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974), it is really more in the nature of a defense. Therefore, determining whether immunity is absolute or qualified is almost as important as determining whether there is immunity in the first place. See *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976).

This is not to say, however, that there may never be summary judgments based on qualified immunity. See, e.g., *Chagnon v. Bell*, 642 F.2d 1248, 1256-65 (D.C. Cir. 1980); *Rodriguez v. Ritchey*, 556 F.2d 1185, 1188 n.7 (5th Cir. 1977) (collecting cases). Cf. *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2737-39 (1982) (attempt to make qualified immunity more amenable to summary judgment).

115. 438 U.S. at 495 & n.22.

116. *Id.* at 508-17. Whether it makes sense to provide special protection for judges, prosecutors, and administrators with analogous agency roles is subject to debate; see *id.* at 528 (Rehnquist, J., concurring in part and dissenting in part); Schuck, *supra* note 114, at 322-25; Note, *Immunity of Federal Executive Officials, The Supreme Court, 1977 Term*, 92 Harv. L. Rev. 265, 269-70 n.35 (1978) [hereinafter cited as Harvard Note], but the debate does not involve the use of "discretion" terminology and is thus beyond the scope of this article. For an in-depth analysis, see Cass, *Damage Suits Against Public Officers*, 129 U. Pa. L. Rev. 1110, 1133-84 (1981). The special protection has recently been held to apply to Presidents as well. *Nixon v. Fitzgerald*, 102 S. Ct. 2690 (1982).

117. 161 U.S. 483 (1896).

118. 438 U.S. at 493-94 (footnote omitted).

119. *Id.* at 494.

ples of fairness embodied in the Constitution."¹²⁰ In other words, because a violation of the Constitution is asserted, there is no absolute immunity because the official cannot be deemed to have been within the scope of his authority. This conclusion may seem at first glance consistent with the reasoning in *Barr*, but only because the plurality opinion in *Barr* did not carefully distinguish the bases for finding that the requirements for immunity were met. A look at each of the various bases shows that a distinction between constitutional and nonconstitutional torts is not warranted.

First, a constitutional violation may occur as a result of a nonministerial, discretionary act. An action that is unconstitutional because of its motivation would be "discretionary" because it would be constitutional if properly motivated. In the case of constitutional torts, it is even likely that motivation or reasoning will be determinative of whether the conduct is tortious.¹²¹ For instance, actions of police officers may be tortious only if undertaken in bad faith,¹²² and actions having an adverse effect on racial minorities may be unconstitutional only if made with the intent to discriminate.¹²³ Thus, constitutional torts are prime examples of the type of cases in which Judge Hand in *Gregoire* found official immunity to apply.

Second, constitutional violations may occur in the exercise of duties described as discretionary because they involve broad public policy determinations. An example would be an agency official who promulgates regulations that discriminate against racial minorities. Applying the distinction that denies immunity to police officers because their duties do not involve the day-to-day application of public policy considerations would clearly not deny immunity to an administrator whose duties involve the issuance of regulations binding on the public. A simple rule that there is no immunity for official acts harming *constitutional* rights would render the promulgating administrator liable. Yet judicial review rather than a tort suit might be the proper way to vindicate the constitutional rights.

120. *Id.* at 495 (footnote omitted).

121. *Baker v. McCollan*, 443 U.S. 137, 140 n.1 (1979). *Cf. Rodriguez v. Ritchey*, 556 F.2d 1185, 1193-94 (5th Cir. 1977) (no implied federal cause of action for negligent police conduct).

122. *See supra* note 97.

123. *E.g., Washington v. Davis*, 426 U.S. 229 (1976).

Third, constitutional violations may occur within an official's line of duty.¹²⁴ Indeed, most constitutional violations involve some state action. For instance, unless the official is acting "under color of" state law or usage, there is no tort cause of action under section 1983.¹²⁵ In *Monroe v. Pape*,¹²⁶ the Supreme Court made it clear that a defendant in a section 1983 suit could be acting under color of state law even though he was violating the federal Constitution. A contrary result would eliminate much of the remedial effect of section 1983.¹²⁷ Similarly, to hold that any unconstitutional act is "outside the perimeter" of the duties of the official would have the effect not only of eliminating the official immunity, but might also eliminate the original basis for liability in cases where state action is a requirement for finding constitutional violations.¹²⁸

Thus, neither the argument based on "discretion" nor that based on scope of duties explains the Supreme Court's apparent distinction between constitutional and nonconstitutional torts for purposes of determining absolute immunity. The reasoning in *Economou* is not persuasive in making this distinction. This is not to say, however, that it is unreasonable to make immunity qualified where a constitutional tort is alleged. Perhaps the need to compensate for infringements of individual rights outweighs the need for vigorous administration when the source of the individual rights is the Constitution, rather than statutes or common law.¹²⁹ There are difficulties, both in theory and practical application, with assigning greater weight to constitutional interests.¹³⁰ These problems should be analyzed directly and not

124. *E.g.*, *G.M. Leasing Corp. v. United States*, 560 F.2d 1011 (10th Cir. 1977) (IRS agents who broke into a home to obtain tax records held acting within the scope of their duties, but acting unconstitutionally); see Cass, *supra* note 116, at 1184-85; Note, *Qualified Immunity for Executive Officials for Constitutional Violations*, 20 B.C.L. Rev. 575, 585-90 (1979) [hereinafter cited as B.C. Note]; see also *Nixon v. Fitzgerald*, 102 S. Ct. 2690, 2705 (1982).

125. 42 U.S.C. § 1983 (1976) ("Every person who, under color of any statute . . . of any state . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and its laws, shall be liable to the party injured . . .").

126. 365 U.S. 167 (1961).

127. *Id.* at 187.

128. Dolan, *Constitutional Torts and the Federal Tort Claims Act*, 14 U. Rich. L. Rev. 281, 305 (1980). But see *Barker v. Norman*, 651 F.2d 1107, 1121 n.18 (5th Cir. 1981).

129. See Freed, *supra* note 92, at 549-51; Note, *Governmental Immunity*, 52 Temple L.Q. 102, 118-20 (1979).

130. See 438 U.S. at 522-24, 526-28 (Rehnquist, J., concurring in part and dissent-

avoided by the confusing oversimplification that unconstitutional acts are not within the discretion of agency officials.

In conclusion, by distinguishing between abusing discretion and exceeding discretion in determining what *acts* are "discretionary," some of the difficulties of official immunity law can be explained, particularly the ministerial-discretionary distinction and the "governmental" versus "professional" discretion distinction. Also, the fiction that the *duties* of many law enforcement officers are "nondiscretionary" becomes explainable by focusing on the lack of a need in their jobs for balancing public policy considerations. Thus, *duties* are discretionary because they involve broad policy judgments; the abuse of or exceeding discretion distinction applies only to *acts*. Finally, distinguishing among (1) acts abusing or exceeding discretion, (2) acts exercising discretionary duties involving broad judgments, and (3) acts falling outside the line of duty promotes a more accurate focus of the relevant policies in determining whether constitutional and nonconstitutional torts should be treated differently for official immunity purposes.

TORT SUITS AGAINST THE GOVERNMENT

Resolution of tort suits against the government also requires the application of terms of "discretion." The Federal Tort Claims Act (FTCA)¹³¹ and many state waivers of sovereign immunity¹³² preclude liability for the exercise of "discretionary functions." The FTCA excludes:

Any claim based upon an act or omission of an employee of the

ing in part). See also B.C. Note, *supra* note 124, at 596-99; Harvard Note, *supra* note 116, at 272-73; Note, *Qualified Immunity for Federal Officials: A Proposed Standard for Defamation Cases*, 58 Tex. L. Rev. 789, 794-95 (1980); Note, *Shielding Federal Officials—Renewed Faith in the Absolute Immunity Doctrine*, 10 U. Tol. L. Rev. 797, 814-17 (1979); Note, *Governmental Immunity—Constitutional Law—Scope of Immunity Available to Federal Executive Officials*, 1979 Wis. L. Rev. 604, 617-21.

Professor Davis states that the "Economou opinion superbly analyzed the case law to create a logical, symmetrical, and understandable structure," K. Davis, *supra* note 10, § 26.19, at 455 (2d ed. Supp. 1982), but that the Court in *Economou* "did not effectively distinguish the *Barr* case," leading to a result that was "illogical." *Id.* § 26.20, at 460, 461. For a recent discussion of the merits of permitting damage suits for constitutional violations, see Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5 (1980).

131. 28 U.S.C. §§ 2671-2680 (1976); *id.* § 1346(b) (United States as defendant).

132. *E.g.*, Calif. Gov't Code § 820.2 (Deering 1982); Iowa Code § 25A.14(1), .14(4) (1981); Kan. Stat. Ann. § 75-6104(d) (1981); Or. Rev. Stat. § 20.265(c) (1982).

Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.¹³³

Just as application of the "discretionary *duties*" terminology permitting suits against law enforcement officials cannot be explained by the ministerial-discretionary *act* distinction for suits against individual officers,¹³⁴ the FTCA discretionary function exception to government liability cannot be applied whenever an official acts within the legal bounds of his discretion. Although it has been suggested that the discretionary function exception be interpreted in accordance with the distinctions used in mandamus cases,¹³⁵ the words of the statute indicate otherwise. The exception does not apply to claims based on the exercise of discretionary *acts*, but rather to claims based on acts in the exercise of discretionary *functions* or *duties*. The inquiry is not whether the official's particular choice is required by the law, but whether it is made as a part of a group of activities of a particular type.

If, instead, the discretionary function exception were interpreted to exclude all actions for which an official had some choice within the law, the result would be anomalous. This anomaly obtains, first, because the discretionary function exception is paired with an exception for claims based on official acts "in the execution of a statute or regulation, whether or not such statute or regulation be valid."¹³⁶ Execution of a constitutionally invalid statute or a legally invalid regulation is not permitted by the law and therefore is beyond an official's discretion. It would be nonsensical to say that the purpose of the discretionary function exception is to permit tort claims only for actions in excess of discretion, *i.e.*, those actions prohibited by the law, when a large number of actions in excess of discretion, such as enforce-

133. 28 U.S.C. § 2680(a) (1976).

134. See *supra* text accompanying notes 96-101.

135. *E.g.*, *Coates v. United States*, 181 F.2d 816, 818 (8th Cir. 1950); see 2 F. Harper & F. James, *supra* note 88, § 29.14, at 1658-59; 2 L. Jayson, *Handling Federal Tort Claims* § 248.03; Zillman, *The Changing Meanings of Discretion: Evolution in the Federal Tort Claims Act*, 76 Mil. L. Rev. 1, 16 (1977).

136. 28 U.S.C. § 2680(a) (1976).

ment of invalid statutes or regulations, do not provide grounds for tort suits against the government. Furthermore, the reasoning that supports the ministerial-discretionary distinction in the mandamus context is the need to limit judicial control of executive acts to cases in which the act is illegal regardless of the reasoning or motivation of the official.¹³⁷ Such reasoning cannot support the discretionary function exception in government torts since many acts which *are* admittedly illegal cannot be the basis of tort suits against the government under the same provision of the statute which contains the discretionary function exception.

Moreover, to interpret the "discretionary" exception as not reaching any claims based on negligence—because motivation or reasoning is irrelevant as to whether there is negligence¹³⁸—would allow all negligence suits to escape the discretionary function exception and thus eviscerate the exception. Most torts other than negligence were expressly exempted by other provisions of the FTCA, at least at the time of its passage.¹³⁹

Accordingly, the phrase "exercise of a discretionary function or duty" should not have the same meaning as "acting within the legal bounds of discretion." Instead, the term "discretionary" has to refer to a certain type of activity. This use of the term as a shorthand adjective to accomplish certain policies has already been exemplified in the context of official immunity suits.¹⁴⁰ Similarly, the term in the sovereign immunity context serves as a code word to incorporate the policies requiring that performance of certain duties not result in *government* liability. "Discretionary," when used as a shorthand adjective to describe duties which should not be the basis for tort claims, need not have the same meaning in the context of sovereign immunity as

137. See *supra* note 26 and accompanying text.

138. See *supra* text accompanying notes 80-81.

139. As originally enacted, the Federal Tort Claims Act precluded liability for claims "arising out of assault, battery, false imprisonment, false arrest, malicious persecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h) (1970). In 1974 the exception was amended to allow liability for claims arising out of the first six named torts "with regard to acts or omissions of [federal] investigative or law enforcement officers." Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (codified at 28 U.S.C. § 2680(h) (1976)).

140. See *supra* text accompanying notes 96-101.

it does in the context of official immunity.¹⁴¹ Requiring the same meaning would ignore the vastly different bases for the two types of immunities. The central purpose of official immunity is to insure vigorous administration by insulating government officials from the fear that their acts will result in lawsuits for damages.¹⁴² Logically that fear is absent, or at least lessened,¹⁴³ when the government, not the individual, is sued. The support for official immunity lies not in fear of lawsuits, but in principles of separation of powers.¹⁴⁴

In a tort suit against the government, the judicial branch can tell the executive agency what it should have done, and thus, in effect, what it should do in the future. For the executive to preserve its powers in a tripartite governmental system, and to restrain courts from making the types of decisions better made by the executive, some limit must be placed on the ability of courts to direct the executive through tort suits. The discretionary function exception provides that limit. The legislative history indicates that even in the absence of an express statutory limit, the courts would have inferred one.¹⁴⁵

Determining exactly where the limit lies may be difficult, but much of the work has been done, at least at the federal level, by the passage of the federal Administrative Procedure Act.¹⁴⁶ The Supreme Court has repeatedly described the APA as having settled "long-continued and hard-fought contentions, and enact[ed] a formula upon which opposing social and political forces

141. *Johnson v. State*, 69 Cal. 2d 782, 787 n.3, 73 Cal. Rptr. 240, 244 n.3, 447 P.2d 352, 356 n.3 (1968) (interpreting California law).

142. *See supra* text accompanying note 90.

143. *See Johnson v. State*, 69 Cal. 2d at 792, 73 Cal. Rptr. at 247, 447 P.2d at 359; 2 F. Harper & F. James, *supra* note 88, § 29.15, at 1663; Schuck, *supra* note 114, at 346-51.

144. *Payton v. United States*, 636 F.2d 132, 143 (5th Cir. 1981); *In re Franklin Nat'l Bank Secs. Litig.*, 478 F. Supp. 210, 221-23 (E.D.N.Y. 1979); Note, *Separation of Powers and the Discretionary Function Exception: Political Question in Tort Litigation Against the Government*, 56 Iowa L. Rev. 930, 946 (1971). *Cf.* Schuck, *supra* note 114, at 354-55 (municipal immunity context).

145. In a statement made during hearings on the Tort Claims Bill, Assistant Attorney General Francis M. Shea expressed the opinion that the exception would be read into the act by judicial construction if it were not specifically included by Congress. *Hearings on H.R. 5373 and H.R. 6463 Before the Comm. on the Judiciary*, 77th Cong., 2d Sess. 29 (1942).

146. APA, *supra* note 1, §§ 551-559, at 701-06.

have come to rest."¹⁴⁷ The APA provides a framework for determining what kind of agency decisions are altogether unreviewable,¹⁴⁸ and also sets up a scheme for determining the courts' scope of review.¹⁴⁹ Accordingly, issues that can be resolved in an APA suit,¹⁵⁰ subject to the limits contained in the APA, ought not to be brought as tort suits. The most frequently quoted excerpt from the legislative history of the FTCA dealing with the discretionary function exception strongly supports this idea:

To take another example, claims based upon an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted. The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion. Nor is it desirable or intended that the constitutionality of legislation, or the legality of a rule or regulation should be tested through the medium of a damage suit for tort.¹⁵¹

Although not referring to the APA, which was not passed until the same year as the FTCA, the language suggests that tort suits will not be allowed to resolve precisely those types of issues that court review under the APA was intended to address: abuse of discretion, unconstitutionality of legislation, and illegality of rules or regulations. In short, the APA provides rules for determining to what extent the courts may review those types of executive acts not amenable to damage suits, and the FTCA provides rules for determining to what extent the courts may review those types of executive acts not amenable to APA suits. The discretionary function exception to the FTCA serves to keep the APA limits from being circumvented by resort to the FTCA, just

147. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 523 (1978) (quoting *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950)).

148. APA, *supra* note 1, § 701; see *supra* text accompanying notes 51-76.

149. APA, *supra* note 1, § 706.

150. The reference to "APA suits" is meant to include both statutory and "non-statutory" judicial review of agency action, as provided for by § 703 of the APA, and not to include tort suits for damages.

151. H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945). The paragraph which contains this quote appeared repeatedly after 1942 prior to inclusion in the House Report of the Congress that adopted the FTCA. See *Dalehite v. United States*, 346 U.S. 15, 29 n.21 (1953); see generally Peck, *The Federal Tort Claims Act: A Proposed Construction of the Discretionary Function Exception*, 31 Wash. L. Rev. 207 (1956).

as the absence of a waiver of sovereign immunity for damages¹⁵² serves to keep the FTCA limits from being circumvented by resort to the APA.

This analysis serves several functions. First, by differentiating between the ministerial-discretionary act distinction and discretionary function analysis, courts can avoid some decisions that conflict with the purpose of the discretionary function exception. Second, a clear focus on the purpose of the discretionary function exception assists in determining when it should be applied. Third, distinguishing between the purpose of the official immunity "discretionary duties" limitation and the purpose of the FTCA discretionary function exception explains why a court may properly reach seemingly conflicting results on identical facts depending upon whether official immunity or sovereign immunity is involved.

Misapplying the Ministerial-Discretionary Act Distinction to the Discretionary Function Exception

Courts on occasion have asserted that the discretionary function exception does not apply to an asserted violation of the law because there can be no discretion to violate the law.¹⁵³ In *Myers & Myers, Inc. v. United States Postal Service*,¹⁵⁴ the Second Circuit held that if plaintiff postal "star route"¹⁵⁵ carrier could assert a state law tort claim based on the denial of a hearing for the Postal Service's refusal to renew six star route contracts, the discretionary function exception would not apply be-

152. *E.g.*, *Washington v. Udall*, 417 F.2d 1310, 1320 n.15 (9th Cir. 1969); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949) (dictum). When Congress abolished the defense of sovereign immunity in APA suits against the federal government, it expressly limited the abolition to actions "seeking relief other than money damages." Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (amending APA, *supra* note 1, § 702 (1976)).

153. *Myers & Myers, Inc. v. United States Postal Serv.*, 527 F.2d 1252, 1261 (2d Cir. 1975); *Birnbaum v. United States*, 436 F. Supp. 967, 973-74 (E.D.N.Y. 1977), *aff'd in part and rev'd in part*, 588 F.2d 319 (2d Cir. 1978); *Avery v. United States*, 434 F. Supp. 937 (D. Conn. 1977); *Cruikshank v. United States*, 431 F. Supp. 1355, 1359 (D. Hawaii 1977). See *Payton v. United States*, 636 F.2d 132, 147 (5th Cir. 1981); Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 Geo. L.J. 81, 91-92 (1968).

154. 527 F.2d 1252 (2d Cir. 1975).

155. A "star route" is a contract awarded by the Postal Service for the transportation of mail between post offices by privately owned trucks for a term of years. *Id.* at 1253.

cause "it is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority."¹⁵⁶ The cases cited as authority for the statement,¹⁵⁷ however, all involved the issue of whether declaratory, injunctive, or mandamus relief could be obtained against a federal officer.

Relying on *Myers & Myers*, the district court in *Birnbaum v. United States*¹⁵⁸ held that the discretionary function exception did not preclude an invasion of privacy suit based on the allegedly unconstitutional opening of mail from Russia by the CIA over a twenty-year period: "There is no discretion under our system to conceive, plan and execute an illegal program."¹⁵⁹ The logic, as pointed out in a cogent student note,¹⁶⁰ fails because it suggests that under the statutory exception containing the discretionary function language the constitutionality of legislation may not be tested, the legality of regulations may not be tested, and the propriety of administrative acts may not be tested for abuse of discretion, but the constitutionality and legality of discretionary administrative acts *may* be tested. No logical basis supports such a distinction. When this argument was presented by the Government on appeal,¹⁶¹ the Second Circuit purported not to reach the question of "whether Congress intended to allow actions to be brought under the [Federal Tort Claims] Act which challenge discretionary acts as unconstitutional,"¹⁶² but nonetheless affirmed on the ground that the CIA's mail opening project was not a "discretionary act" because the CIA lacked authority to conduct such a program.¹⁶³

156. *Id.* at 1261.

157. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-90 (1949); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170-71 (1803); *Century Arms, Inc. v. Kennedy*, 323 F. Supp. 1002, 1005 (D. Vt.), *aff'd*, 449 F.2d 1306 (2d Cir. 1971), *cert. denied*, 405 U.S. 1065 (1972).

158. 436 F. Supp. 967, 973-74 (E.D.N.Y. 1977), *aff'd in part and rev'd in part*, 588 F.2d 319 (2d Cir. 1978).

159. 436 F. Supp. at 973-74. The court also relied on *Hatahley v. United States*, 351 U.S. 173, 191 (1956). *Hatahley* does not clearly support the court's reasoning, however. See *infra* note 164.

160. Note, *The Discretionary-Function Exception to the Federal Tort Claims Act*, 42 Albany L. Rev. 721, 730-31 (1978).

161. It should be noted that I represented the United States on appeal in *Birnbaum*. Nothing said here purports to represent the views of the United States Department of Justice.

162. *Birnbaum v. United States*, 588 F.2d 319, 329 (2d Cir. 1978).

163. *Id.* at 329-32.

The argument, however, was based on the statutory illegality of the program,¹⁶⁴ and thus missed the point: the need for analysis considering the policies underlying the discretionary function exception is not eliminated merely because an action or

164. The argument was based on a reading of *Hatahley v. United States*, 351 U.S. 173 (1956), that is not clearly supported by the language of the opinion.

In *Hatahley*, certain Navajo Indians living in southeastern Utah sued under the FTCA to recover for the confiscation and destruction by federal agents of their horses, which were grazing on public lands of the United States. The Government defended on the ground that the federal agents were acting pursuant to the Utah abandoned horse statute. The record indicated that the statute was applied discriminatorily against the Indians, whose horses were essential to their existence. *Id.* at 176-77. The Supreme Court first held that the Utah abandoned horse statute could not be invoked by the local federal range manager to avoid the requirements of a federal regulation governing the removal of livestock trespassing on federal land. *Id.* at 177-80. The Supreme Court then analyzed two distinct issues under the FTCA. First it determined whether the federal agents were acting within the scope of their employment, a requirement under the Act. The Court reasoned:

The fact that the agents did not have actual authority for the procedure they employed does not affect liability. There is an area, albeit a narrow one, in which a government agent, like a private agent, can act beyond his actual authority and yet within the scope of his employment.

Id. at 180-81. In a few sentences the Court then resolved the second issue, which was whether the exceptions of § 2680(a) of the FTCA applied. The Court found that the first part of § 2680(a) (due care execution of a statute or regulation) did not apply since the federal agents were not exercising due care. As to the second part (exercise or performance of a discretionary function), the Court stated only:

Nor can the second portion of (a) exempt the Government from liability. We are here not concerned with any problem of a "discretionary function" under the Act. These acts were wrongful trespasses not involving discretion on the part of the agents, and they do give rise to a claim compensable under the Federal Tort Claims Act.

Id. at 181 (citation omitted). Contrary to the inference of the Second Circuit, 588 F.2d at 330, the Supreme Court did not say that these acts were wrongful trespasses and *therefore* they do not involve discretion on the part of the agents; instead the Court merely concluded that "[t]hese acts were wrongful trespasses not involving discretion on the part of the agents," 351 U.S. at 181, without stating the basis for the conclusion.

A more likely reason for the conclusion that discretion was not involved is that the actions were taken at a low level in contravention of regulations promulgated by the agency to govern the very activity for which damages were sought. *See infra* text accompanying notes 172-99. Pursuant to statutory authority, the Secretary of the Interior promulgated regulations which required that in the case of unlawful grazing of livestock, written notice together with an order to remove the livestock must be served on the alleged violator. 351 U.S. at 177-78. Thus at the policy-making level—where decisions are amenable to judicial review under the APA—it was determined that "[o]nly 'if the alleged violator fails to comply with the notice' may the range manager proceed under local impoundment law and procedure." *Id.* at 178. At the operational level, the range manager proceeded in the absence of the express preconditions required by the agency. *Id.* The decision to act and the wrongful actions themselves were arguably so contemporaneous as to make the actions practically controllable only through after-the-fact tort suits for damages.

program is contrary to law.¹⁶⁵ Application of underlying policy considerations might sometimes result in a conclusion that the exception does not apply,¹⁶⁶ but that result will not be reached in all cases involving an illegal action. In *Birnbaum*, for instance, a challenge to the constitutionality of a program authorized at the highest levels and carried out over twenty years seems like the kind of suit appropriate under the APA.¹⁶⁷ Indeed, if the program had been authorized by a regulation, it would have been clear that no tort suit would have been allowed.¹⁶⁸

The term "discretionary" is used as a shorthand adjective for policies allocating the modes of judicial review of executive actions; the distinction between ministerial and discretionary acts appropriate in the mandamus context is not relevant to sov-

165. For example, in *Kiiskila v. United States*, 466 F.2d 626 (7th Cir. 1972), the decision of the commander of a military installation to exclude a civilian from the post, although improper and a violation of the civilian's constitutional rights, was held to be an exercise of a discretionary function.

166. For example, the discretionary function exception may not have applied in the fact situation of *Myers & Myers, Inc. v. United States Postal Serv.*, 527 F.2d 1252 (2d Cir. 1975), for reasons more closely related to the policies underlying the exception. In *Myers* a former "star route" carrier for the United States Postal Service brought suit for alleged negligence by the Postal Service in connection with its refusal to renew six star route contracts. The basis of the plaintiff's claim was that the failure to renew resulted solely from the Service's wrongful and negligent interpretation of information received by the Service concerning the plaintiff's truck rental arrangements. *Id.* at 1255. The Second Circuit held that determining whether or not to renew a star route contract involved a number of policy factors and accordingly involved the exercise of a discretionary function. *Id.* at 1256-57. The court also rejected plaintiff's claim based on "negligent investigation" of the facts surrounding the contract renewal decision, on the ground that the claim was really one of abuse of discretion and therefore was precluded by the discretionary function exception. *Id.* at 1257. The court, however, then made the following analysis: (1) the Postal Service, anticipating constitutional requirements, provides by regulation for notice and a hearing in the circumstances of the plaintiff's case, and none was given, *id.* at 1257-60, (2) state law might provide a cause of action for refusal to grant such a hearing, *id.* at 1260-61, and (3) if so, § 2680(a) would not preclude FTCA jurisdiction, *id.* at 1261-62. As in *Hatahley*, the argument might be that the determination made at the policy-making level, embodied in the Postal regulation—that notice and hearing must be provided in order to bar someone from consideration for star route contract awards—was not carried out by those persons acting at the operational level who barred the plaintiff.

167. The Second Circuit was candid in acknowledging that it was motivated in part by the knowledge that its decision finding liability under the FTCA immunized the individual CIA employees from personal liability. 588 F.2d at 329-33. See 28 U.S.C. § 2676 (1976).

168. Such authorization was unlikely under the facts of the case, but that is arguably an irrelevant distinction for purposes of determining whether a tort suit is appropriate.

oreign¹⁶⁹ immunity.

A Rationale for Applying the Discretionary Function Exception

Since the ministerial-discretionary distinction does not aid in determining whether the discretionary function exception applies, another standard is required. The literature contains several extensive analyses of the cases;¹⁷⁰ little purpose would be served by examining the whole history of numerous cases applying or refusing to apply the exception. Many of the apparently anomalous cases, however, may be explained by focusing on whether the claim is more appropriately resolved in a tort suit for damages, than in an APA suit for judicial review of agency action. Such a focus follows rather explicitly from the legislative history of the FTCA.¹⁷¹

The institution of a program at a high policy-making level is a paradigm case for applying the exception.¹⁷² Such an action could be challenged by an APA suit either to stop the program or to have it declared illegal. Limitations on such suits should not be circumvented by allowing the challenge under the guise of a tort suit against the government.¹⁷³ Indeed, if the program

169. Professor Schuck has made a similar point in his discussion of municipal government immunity under 42 U.S.C. § 1983. Schuck, *supra* note 114, at 353-56.

170. *Blessing v. United States*, 447 F. Supp. 1160, 1169-86 (E.D. Pa. 1978); see 2 L. Jayson, *supra* note 135, §§ 248, 249; Comment, *Federal Tort Claims Act: Discretionary Function Exception Revisited*, 31 U. Miami L. Rev. 161 (1976) [hereinafter cited as Miami Comment].

171. See *supra* notes 150-51 and accompanying text.

172. The leading Supreme Court case applying the exception, *Dalehite v. United States*, 346 U.S. 15 (1963), involved damage claims resulting from the disastrous explosion at Texas City, Texas, of fertilizer-grade ammonium nitrate (FGAN) while aboard a vessel in the harbor. The FGAN had been produced pursuant to a federal program designed to increase the food supply of devastated areas of Germany, Japan, and Korea following World War II. The Supreme Court noted that the application of the discretionary function exception to "the cabinet-level decision to institute the fertilizer export program was . . . not seriously disputed." *Id.* at 37.

Decisions to undertake public works projects generally have been held protected by the discretionary function exception. *E.g.*, *Wright v. United States*, 568 F.2d 153, 159 (10th Cir. 1977), *cert. denied*, 439 U.S. 824 (1978); *Boston Edison Co. v. Great Lakes Dredge & Dock Co.*, 423 F.2d 891, 896 (1st Cir. 1970); *Harris v. United States*, 205 F.2d 765, 766-67 (10th Cir. 1953); *Coates v. United States*, 181 F.2d 816, 817 (8th Cir. 1950); 2 L. Jayson, *supra* note 135, § 249.06[2].

173. Thus whether a particular plaintiff may reach the merits should not be determinative. APA suits may be dismissed, for example, for lack of standing or failure to exhaust administrative remedies, while the underlying issue on the merits is otherwise

were set up by regulation and if due care were used in the execution of the regulation, a tort suit would be expressly precluded.¹⁷⁴ A broad program by definition involves numerous people and has future effect. Accordingly, APA-type review can be applied to the actions taken. Such review would be allowed, assuming that other requirements, such as standing and ripeness, are met. Judicial review to ensure no abuse of discretion,¹⁷⁵ no violation of law,¹⁷⁶ and compliance with proper procedures¹⁷⁷ is appropriate. The tort standards of reasonableness, proximate cause, and duty, however, do not lend themselves to such determinations. They were developed to apply to specific private acts on a case-by-case basis. Although tort standards involve the weighing of public interests, if those interests can be weighed as a matter of administrative law, under a body of law which has balanced opposing political and social forces,¹⁷⁸ there is little need for and perhaps some danger in developing a second body of tort law as a supplemental means for the judiciary to control the executive.

The opposite is true with regard to such governmental actions as driving an automobile¹⁷⁹ or diagnosing the sickness of a veteran.¹⁸⁰ Concepts such as abuse of discretion, developed in the administrative law context, do not apply well to these actions. The injury results typically from a choice of action that is not the subject of much prior consideration, and thus cannot be controlled by APA judicial review in any meaningful way. For instance, a truck driver's going over the speed limit or a VA doc-

amenable to APA review because it would be actionable for abuse of discretion or violation of law by a plaintiff who had standing and who had exhausted administrative remedies.

174. 28 U.S.C. § 2680(a) (1976).

175. APA, *supra* note 1, § 706(2)(A).

176. *Id.* § 706(2)(A)-(C).

177. *Id.* § 706(2)(D).

178. See *supra* text accompanying note 147.

179. *E.g.*, Friday v. United States, 239 F.2d 701, 702 (9th Cir. 1957); Blessing v. United States, 447 F. Supp. 1160, 1168 n.8, 1169 n.11 (E.D. Pa. 1978); Crouse v. United States, 137 F. Supp. 47, 49 (D. Del. 1955).

180. *E.g.*, Supchak v. United States, 365 F.2d 844, 845 (3d Cir. 1966); Hunter v. United States, 236 F. Supp. 411, 411-12 (M.D. Tenn. 1964). But see Fahey v. United States, 153 F. Supp. 878, 886 (S.D.N.Y. 1957).

Exercises of medical judgment are typically held not to be exercises of discretionary functions. Hendry v. United States, 418 F.2d 774, 783 (2d Cir. 1969); Fair v. United States, 234 F.2d 288, 294 (5th Cir. 1956); Blessing v. United States, 447 F. Supp. at 1185 n.33; see 2 L. Jayson, *supra* note 135, § 249.04[3].

tor's misdiagnosing a veteran could not be challenged in a declaratory, injunctive, or mandamus suit. By their nature there is no way to challenge such acts until they are done. Accordingly, a tort suit for damages is an appropriate means for the judiciary to control the executive's acts. Moreover, tort law has developed standards for evaluating such acts, and such standards are as easily applied to the government worker as to the civilian worker.

Similar considerations, focusing on the practical amenability of actions of the type challenged to the administrative law concepts of judicial review codified in the APA, serve to justify the bulk of the decided cases under the FTCA discretionary function exception. For instance, the review of a refusal to grant a license is obviously contemplated by the APA.¹⁸¹ Thus, the courts have generally refused to grant tort relief for the wrongful exercise of licensing power,¹⁸² except in a few questionable cases where the licensure determination was made directly on the basis of a professional medical opinion,¹⁸³ thereby invoking tort-like considerations.

Similar considerations would apply whenever an agency adjudicates by gathering or examining evidence in order to reach a relatively formal¹⁸⁴ factual conclusion. The law of review of agency determination of fact has developed and is developing in

181. For instance, "order" is expressly defined to include licensing. APA, *supra* note 1, §§ 551(6), 701(b)(2).

182. *Hoffman v. United States*, 600 F.2d 590, 591 (6th Cir. 1979) (issuance of aviation license), *cert. denied*, 444 U.S. 1073 (1980); *Thompson v. United States*, 592 F.2d 1104, 1110-11 (9th Cir. 1979) (permit to race motorcycles on federal land); *First Nat'l Bank v. United States*, 552 F.2d 370, 377 (10th Cir. 1977) (fungicide registration), *cert. denied*, 434 U.S. 835 (1977); *Coastwise Packet Co. v. United States*, 398 F.2d 77, 80 (1st Cir. 1968) (Coast Guard certificate for vessel to carry passengers), *cert. denied*, 393 U.S. 937 (1968); *United States v. Morrell*, 331 F.2d 498, 502 (10th Cir. 1964) (grazing permit under Taylor Grazing Act), *cert. denied*, 379 U.S. 879 (1964); *Dupree v. United States*, 247 F.2d 819, 825 (3d Cir. 1957) (Coast Guard merchant marine employment document); see 2 L. Jayson, *supra* note 135, § 249.05[2].

183. *Hendry v. United States*, 418 F.2d 774, 783 (2d Cir. 1969); *Duncan v. United States*, 355 F. Supp. 1167 (D.D.C. 1973); see also *Griffin v. United States*, 500 F.2d 1059, 1066-67 (3d Cir. 1974) (availability of professional negligence standards supports rejection of discretionary function argument).

184. The term "relatively formal" is used to include adjudications which may not be "formal" in the sense that the formal adjudication provisions of § 554 of the APA apply, but generally to include cases in which the agency makes a factual finding on the basis of evidence collected or submitted by persons other than the deciding official.

the context of APA-type suits for judicial review.¹⁸⁵ No need exists to permit review of agency factfinding by means of tort suits, even though it could be said that an agency has no "discretion" to find untrue facts. Allowing such additional judicial control might upset the balance of procedural factfinding established by the APA¹⁸⁶ and by agency statutes.¹⁸⁷ It therefore makes sense to interpret the discretionary function exception as prohibiting claims based on "wrongful" adjudications.¹⁸⁸

Promulgation of regulations is likewise an activity that is controlled by the judiciary under administrative law principles.¹⁸⁹ The rules are of future effect¹⁹⁰ and thus are amenable to suits in the nature of injunctions, declaratory actions, or mandamus.¹⁹¹ The rules typically affect large numbers of people and involve considerations of public policy; the degree to which courts should interfere with such decisions has been determined in the law of judicial review of agency actions.¹⁹² These reasons are the same as those which support the immunity from claims based on the due care execution of allegedly illegal regulations.¹⁹³ Accordingly, it follows that tort suits based on the wrongful promulgation or nonpromulgation of regulations are precluded.¹⁹⁴

185. *E.g.*, *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

186. APA, *supra* note 1, § 706(2)(E)-(F).

187. *E.g.*, *Chandler v. Roudebush*, 425 U.S. 840 (1976) (de novo review under the Civil Rights Act); *Dickinson v. United States*, 346 U.S. 389 (1953) ("basis in fact" review under Selective Service Act).

188. *E.g.*, *Payton v. United States*, 679 F.2d 475 (5th Cir. 1982) (en banc) (Board of Parole decision); *Reminga v. United States*, 631 F.2d 449, 457 (6th Cir. 1980) (FAA decision to permit TV tower construction). *Cf.* *Bergmann v. United States*, 689 F.2d 789 (8th Cir. 1982) (selection of federally protected witness held to be a discretionary function).

189. *E.g.*, *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967).

190. *See* APA, *supra* note 1, § 551(4).

191. In addition, regulations are challengeable in defense of subsequent enforcement. *Id.* § 703. *Cf.* *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (NLRB order, based on prior agency rule, upheld, although a majority of the Justices found that the prior rule violated APA requirements).

192. *Compare* *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967) (inspection procedures announced by FDA, held not ripe for pre-enforcement judicial review), *with* *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967) (regulations promulgated by FDA held ripe for pre-enforcement judicial review).

193. 28 U.S.C. § 2680(a) (1976).

194. *Gabarino v. United States*, 666 F.2d 1061, 1065 (6th Cir. 1981); *Miller v. United States*, 522 F.2d 386, 387 (6th Cir. 1975); *Weinstein v. United States*, 244 F.2d 68, 71 (3d Cir.), *cert. denied*, 355 U.S. 868 (1957); *Dupree v. United States*, 247 F.2d 819, 824 (3d Cir. 1957); *Blessing v. United States*, 447 F. Supp. 1160, 1172-73 & n.18 (E.D. Pa.

Not all government decisions are immune, however. Some, by their nature, are best examined in the context of a tort suit. By negative inference from the previous examples, some characteristics of government acts that should not be immunized can be ascertained. If the government activity or choice is of immediate effect and cannot be challenged until it is executed, judicial review is not a satisfactory means for the courts to check the executive. Instead, tort suits for damages provide the means for judicial control of acts of government employees. For example, the decision to employ or not to employ navigation aids by the Coast Guard applies to the future, affects numerous people, and accordingly can be reviewed for legality or abuse of discretion only under the APA: it is the exercise of a "discretionary function."¹⁹⁵ The negligent maintenance of a particular aid, however, shares none of those characteristics.¹⁹⁶ It is instead a one-time action or inaction, which can be reviewed only after the fact. Thus, there should be no tort immunity for such a particular negligent act because the purpose of the discretionary function exception does not apply.

Many courts and commentators have characterized this distinction as one between acts at the "planning" level and acts at the "operational" level.¹⁹⁷ Most acts of planning involve public policy considerations, are of future effect, and affect large numbers of people. Thus, review of those decisions would fall typically within the discretionary function exception. Acts undertaken to carry out such plans can be challenged in a meaningful manner only in a suit for damages because the manner of execution is not determined until the execution. The planning versus operational distinction thus serves the purposes of the exception, as long as courts do not lose sight of the underlying basis for the distinction. If particular actions that may be characterized as "planning" are in fact not reviewable in a meaningful

1978); *Relf v. United States*, 433 F. Supp. 423, 427 (D.D.C. 1977), *aff'd mem.*, 593 F.2d 1371 (D.C. Cir. 1979); 2 L. Jayson, *supra* note 135, § 249.05[1].

195. *E.g.*, *Bearce v. United States*, 614 F.2d 556, 560 (7th Cir. 1980).

196. *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). See 2 L. Jayson, *supra* note 135, § 249.04[10].

197. *E.g.*, *Lindgren v. United States*, 665 F.2d 978, 980 (9th Cir. 1982); *Emch v. United States*, 630 F.2d 523, 527 (7th Cir. 1980); *Aretz v. United States*, 604 F.2d 417, 427-28 (5th Cir. 1979); *In re Franklin Nat'l Bank Secs. Litig.*, 478 F. Supp. 210, 220-21 (E.D.N.Y. 1979); Reynolds, *supra* note 153, at 103-07, 128-32; Miami Comment, *supra* note 170, at 171-72.

manner in APA-type suits, or are particularly amenable to tort standards of care, the determination that they are "planning" level actions should not preclude a tort suit.¹⁹⁸ Similarly, some actions, such as formal adjudications, cannot be termed planning; they are operational actions. Nonetheless, because of their peculiar amenability to APA-type judicial review and the inappropriateness of tort law to review the decision, the discretionary function exception should apply.¹⁹⁹

An approach to discretionary function immunity based on whether APA-type review can be applied meaningfully to the challenged government action presents three problems: (1) it is arguably inconsistent with the compensatory purpose of the FTCA; (2) it arguably fails to explain cases in which the exception excludes claims and the APA also precludes judicial review; and (3) it may be difficult to tell whether a particular one-time act is immunized if it is carried out in furtherance of a decision not reviewable in a tort suit.

A person injured by improper governmental acts who receives no FTCA compensation is not likely to be comforted by the availability of a type of suit that allows a judicial check on executive action, but does not allow an award of damages. The primary purpose of the FTCA is to compensate people injured by wrongful government conduct, rather than to provide a judicial check on executive action. Given that purpose, arguably it should not make any difference that the issues raised by the suit can be raised in APA judicial review proceedings; instead, application of the discretionary function exception should depend upon factors relating to whether the claimant is deserving of compensation. There are two answers to this argument. First, the premise that there is an alternate means to obtain judicial review of the action suggests that the claimant could have averted or limited the harm by seeking to stop the action in an

198. See *Blessing v. United States*, 447 F. Supp. 1160, 1173-74 & n.19, 1176 n.24 (E.D. Pa. 1978).

199. Jayson also rejects the "planning vs. operational-level conduct" test as conclusive of the applicability of the exception. 2 L. Jayson, *supra* note 135, § 249.07. He suggests that some exercises of discretionary functions referred to in the legislative history of the FTCA could be "operational level conduct"—for example, "directing the expenditure of federal funds, or a negligent exercise of the blacklisting or freezing powers by the Treasury Department, or certain regulatory acts of officials of the Federal Trade Commission or the Securities and Exchange Commission." *Id.*

APA-type suit. In such cases the claimant is less deserving of compensation. However, not everyone who is injured could have averted the injury through an APA-type suit.²⁰⁰

Second, although the overall purpose of the FTCA may be to provide compensation, the particular purpose of the discretionary function exception is unrelated to compensation policies. Nothing in the language or history of section 2680(a) of the FTCA indicates that persons injured by torts falling within the exception are less deserving of compensation.²⁰¹ Indeed, concern for compensating persons injured by wrongful government acts would seem to demand liability for harm arising out of the careful execution of unlawful regulations, and such injuries are clearly not compensable under the exception. It follows that policies unrelated to compensation support the discretionary function exception, and an analysis of such distinct policy concerns should govern the interpretation of the exception.

Grounding discretionary function immunity on the "amenability" of issues to APA-type review also presents the question of what to do with actions unreviewable under the APA, either because review is precluded by statute,²⁰² or because the action is "committed to agency discretion by law."²⁰³ If review is precluded by statute, all that is required is statutory interpretation to determine whether tort suits for damages are within the preclusionary language of the statute.²⁰⁴ One might argue that if actions are unreviewable under the APA because they are "committed to agency discretion by law," the policy of not subjecting issues amenable to resolution in APA judicial review to examination in tort suits would not apply. The answer lies in the inter-

200. See *supra* note 173.

201. Contrast, for instance, the history of 28 U.S.C. § 2680(b), which maintains sovereign immunity with regard to claims "arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." The provision was justified by a representative of the Justice Department during hearings on the FTCA in part because "[e]very person who sends a piece of postal matter can protect himself by registering it" *Hearings on S. 2690 Before the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 38 (1940); see *Birnbaum v. United States*, 436 F. Supp. 967, 974 (E.D.N.Y. 1977), *aff'd in part and rev'd in part*, 588 F.2d 319 (2d Cir. 1978).

202. APA, *supra* note 1, § 701(a)(1).

203. *Id.* § 701(a)(2); see *supra* text accompanying notes 50-76.

204. Cf. *Whitecliff, Inc. v. United States*, 536 F.2d 347, 349-51 (Ct. Cl. 1976) (statutory preclusion of jurisdiction to review certain Medicare determinations interpreted not to preclude a contract action for damages), *cert. denied*, 430 U.S. 969 (1977).

pretation of the "committed to agency discretion" language.²⁰⁵ If the law allows an agency to choose among a certain range of alternatives on any basis or reasoning, then the action is "committed" to agency discretion. In such circumstances, it would be impossible for the choice to have been wrongful; accordingly there is no basis for a tort suit in the first place. Moreover, the separation of powers considerations that typically underlie the legal conclusion that a particular decision is committed to agency discretion²⁰⁶ also support the conclusion that a tort suit for damages is unwarranted. If the reason that a claim is not amenable to APA judicial review is that the judiciary should be prevented from interfering in certain kinds of executive activities, then permitting tort suits would circumvent that policy. The courts accordingly have applied the discretionary function exception in tort suits to those types of activities that have also been held committed to agency discretion by law, such as acts concerning foreign relations²⁰⁷ and exercises of prosecutorial discretion.²⁰⁸

A third problem with basing discretionary function tort immunity on whether APA-type review can be applied meaning-

205. See *supra* text accompanying note 58.

206. See *supra* text accompanying notes 69-72.

207. *Miller v. United States*, 583 F.2d 857, 868 (6th Cir. 1978); *Four Star Aviation, Inc. v. United States*, 409 F.2d 292, 295 (5th Cir. 1969). See also *supra* note 71 and accompanying text.

208. *E.g.*, *Smith v. United States*, 375 F.2d 243, 248 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967); see *Blessing v. United States*, 447 F. Supp. 1160, 1179-80 & n.28 (E.D. Pa. 1978); see also *supra* note 72 and accompanying text.

Tort suits based on military orders would also presumably be precluded. See *supra* note 70 and accompanying text; see also *Smith v. United States*, 330 F. Supp. 867, 868 (E.D. Mich. 1971) (issuance of orders to federalized National Guardsmen). *Cf.* *Reed v. Hadden*, 473 F. Supp. 658, 660 (D. Colo. 1979) (federal prison classification of inmates); *Muniz v. United States*, 280 F. Supp. 542, 549 (S.D.N.Y. 1968) (same); *Monarch Ins. Co. v. District of Columbia*, 353 F. Supp. 1249, 1256-61 (D.D.C. 1973) (failure to station police), *aff'd mem.*, 497 F.2d 684 (D.C. Cir.), *cert. denied*, 419 U.S. 1021 (1974); *Barroll v. United States*, 135 F. Supp. 441, 449 (D. Md. 1955) (choice of where to test cannons).

Review of contract awards has also been very limited under the APA. *E.g.*, *Kentron Hawaii, Ltd. v. Warner*, 480 F.2d 1166, 1169 (D.C. Cir. 1973); *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1301 (D.C. Cir. 1971); see also *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940). Suits for damages for negligent awards of government contracts have been held precluded by the discretionary function exception. *E.g.*, *Myers & Myers, Inc. v. United States Postal Serv.*, 527 F.2d 1252, 1256-57 (2d Cir. 1975); *Gowdy v. United States*, 412 F.2d 525, 529 (6th Cir.), *cert. denied*, 396 U.S. 960 (1969); *Lipka v. United States*, 249 F. Supp. 213, 216-17 (N.D.N.Y. 1965), *aff'd on other grounds*, 369 F.2d 288 (2d Cir. 1966), *cert. denied*, 387 U.S. 935 (1967). But see *Melton v. United States*, 488 F. Supp. 1066, 1072-73 (D.D.C. 1980). See 2 L. Jayson, *supra* note 135, § 249.04[5].

fully to government actions is the difficulty of determining whether review of a particular action requires review of an antecedent or higher level decision that is clearly an exercise of a discretionary function.²⁰⁹ One answer is that this problem arises no matter what definition is posited for "discretionary function." Professor Peck has suggested an analysis similar to that of proximate cause in traditional negligence law that adapts effectively to this, as well as other rationalizations of the discretionary function exception. The exception applies when "the acts or omissions of which the plaintiff complains were specifically directed, or risks knowingly, deliberately, or necessarily encountered, by one authorized to do so"²¹⁰ under a decision or action that itself was an exercise of a discretionary function. This approach finds support in the language of the statute, as pointed out by Professor Peck: "The exception is of claims 'based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty. . . .' The exception is not of claims 'arising out of' exercise or performance—the terminology used in the succeeding subsection, 28 U.S.C. § 2680(b)."²¹¹ Although the "scope of the risk" idea may have some of the same difficulties of application found in proximate cause analysis,²¹² it is essentially workable²¹³ and reflects the purpose of the excep-

209. For instance, in *Dalehite*, it was relatively clear that the cabinet level decision to institute the fertilizer export program was an exercise of a discretionary function, *supra* note 172, but the more difficult question was whether specific acts of negligence—such as bagging at a high temperature—alleged in the manufacture of the fertilizer in carrying out the program were also exercises of discretionary functions. See 346 U.S. at 38-42.

210. Peck, *supra* note 151, at 225-26.

211. *Id.* at 228.

212. *Id.* at 231.

213. Professor Peck suggested the following examples:

[A] discretionary decision to establish a wildlife sanctuary would involve, either consciously or by unexpressed assumption, a decision to incur the risk that birds will eat the grain of farmers in the area. One deciding to conduct a test of an explosive atomic energy device obviously intends to run the risk that vibrations caused by the explosion may cause cracks to appear in buildings at a considerable distance. One deciding where to locate an airbase for bombers or an ordnance proving ground must intend to cause that nuisance, annoyance, and damage which is necessary in the careful operation of either.

Id. at 227 (footnotes omitted). In contrast, setting up fences around the wildlife sanctuary in a careless fashion; see *Foster v. United States*, 183 F. Supp. 524, 528 (D.N.M. 1959), *aff'd mem.*, 280 F.2d 431 (10th Cir. 1960); failing to warn local residents of atomic blasts; see *Bulloch v. United States*, 133 F. Supp. 885, 888-89 (D. Utah 1955); see also *Lindgren v. United States*, 665 F.2d 978 (9th Cir. 1982) (discussing failure to warn cases); or driving a vehicle on the airbase in a negligent manner; see *Friday v. United States*,

tion. If a challenge to a particular action necessarily involves a challenge to another decision that Congress desires to be reviewed, if at all, under APA-type judicial procedures, then allowing the action to be reviewed in a tort context would circumvent the purposes of the discretionary function exception.

"Discretionary Function" and the Relationship Between Official and Sovereign Immunity

It might be argued that the determination of whether an official's functions are "discretionary," with resulting immunity from individual liability for nonconstitutional torts, ought to be coterminous with the determination of whether an official's duties are an "exercise of a discretionary function" for purposes of ascertaining whether the government is immune from suit under a statutory waiver, such as the FTCA. Such a conclusion would follow from an assumption that the word "discretionary" has much intrinsic meaning when used to describe the nature of a group of activities or functions. If, however, the term is recognized as a shorthand adjective to incorporate policy reasons for a particular immunity, it is more logical to conclude that when the underlying policies differ, the meaning may differ as well.

The policy reasons that support official immunity—primarily avoiding the discouragement of vigorous administration²¹⁴—are different from those that support the immunity retained by the discretionary function exception—avoiding circumvention of the carefully balanced administrative law scheme codified in the APA for judicial control of administrative action.²¹⁵ Professor Davis has even suggested that if public policy supports immunity in the one case, it more or less automatically supports nonimmunity in the other. That is, if the official is immune, the government should not be.²¹⁶ A determination that

239 F.2d 701, 702 (9th Cir. 1957); would not be risks deliberately or necessarily encountered by the exercises or discretionary functions suggested.

214. See *supra* note 90 and accompanying text.

215. See *supra* notes 144-52 and accompanying text.

216. K. Davis, *supra* note 10, §§ 26.21, 26.23, at 461-62, 475-77 (2d ed. Supp. 1982).

This idea, however, cannot logically be extended to the situation where there is no tort or where there is a nonimmunity defense. It would make no sense to say that if a government official is not personally liable for harm to someone, then the government automatically is. Thus where a law enforcement official has a good faith defense—not accurately called an immunity, see *supra* note 114—it makes sense to say that the government is not liable. *Norton v. United States*, 581 F.2d 390 (4th Cir. 1978) (good faith

functions are discretionary for purposes of official immunity does not necessarily control whether functions are discretionary for purposes of government immunity. For instance, the Court of Appeals for the District of Columbia Circuit recently concluded that an individual defendant had absolute immunity from certain claims, while rejecting a discretionary function argument asserted by the United States.²¹⁷ The plaintiff, who had been wrongfully detained by German officials as a result of an inaccurate communique sent by the Chief of the United States National Central Bureau (the United States liaison with Interpol),²¹⁸ brought suit against the Government and the Chief for false arrest, false imprisonment,²¹⁹ defamation, and various constitutional claims.

The D.C. Circuit held that summary judgment should not have been granted to the United States on grounds of the discretionary function exception. Relying on the extensive analysis found in *Blessing v. United States*,²²⁰ the court concluded, "[O]n the present record there is no clear indication that the decisions by *this* USNCB official concerning the nature of the information transmitted abroad, including the status of an extradition request, were essentially 'political,' 'social' or 'economic' or necessarily involved any policy-making function at all."²²¹ The court's refusal to apply the discretionary function exception to the government is quite reasonable for two reasons. First, the wrongful way in which the official carried out his duties could be controlled only after the fact. Second, there was no indication that the risk of sending inaccurate communiques, like

defense of FBI agents may be asserted by the United States under the 1974 amendment to the FTCA).

217. *Sami v. United States*, 617 F.2d 755 (D.C. Cir. 1979).

218. Plaintiff had custody of his children under a Maryland court order. He transported the children from Florida, where his wife had custody under a Florida court order, to Maryland, in violation of Florida law. A Maryland court issued an arrest warrant on the basis of two Florida warrants for plaintiff's arrest. Plaintiff flew to Germany with the children, and following information from the wife, the Bureau Chief sent a communique to an Interpol liaison in Wiesbaden, erroneously (a) stating "that the United States [rather than Florida] will extradite," (b) stating that the Maryland custody order had been superseded by the subsequent arrest warrant issued by a Maryland court, and (c) characterizing the Maryland arrest warrant as a felony warrant. After plaintiff was detained by German authorities, the United States State Department determined that no extraditable offense was involved. *Id.* at 757-58.

219. *See supra* note 139.

220. 447 F. Supp. 1160, 1167-86 (E.D. Pa. 1978).

221. 617 F.2d at 767.

those sent by the Bureau Chief, was inherently necessitated by the program he carried out. No circumvention of APA-type review was involved.

The court, however, found the Bureau Chief absolutely immune from the nonconstitutional²²² claims for defamation, false arrest, and false imprisonment. The court concluded that the Bureau Chief's duties were sufficiently discretionary to warrant absolute official immunity.²²³ Relying on the differing primary concerns of sovereign liability (compensation) and personal liability (deterrence),²²⁴ the court concluded that "there is enough play in the joints of the doctrine of official immunity to permit a distinction on the basis of 'discretion' between personal and sovereign liability on the facts of this case."²²⁵ Because the need for vigorous independent action on the part of the United States liaison with Interpol might not be met if the Bureau Chief feared that inaccurate communications to foreign police departments would result in personal liability, the court's finding of official immunity was also reasonable. Recognition that "discretionary functions" is simply shorthand for saying that the policies of the relevant immunity are applicable renders logical the court's conclusion that particular actions may be discretionary functions for one purpose and not for another.

TORT SUITS AGAINST FOREIGN GOVERNMENTS

More recently, the term "discretionary function" has been used to define the scope of another immunity, that of foreign sovereigns. Many of the same points with regard to domestic sovereign immunity can be made in this context, although the underlying policy concern of foreign sovereign immunity is somewhat different.

The immunity of the government of one nation in the courts of another is governed by international law.²²⁶ The former rule

222. The court found that no actionable claims of constitutional proportion were presented, *id.* at 773, relying on the holding of *Baker v. McCollan*, 443 U.S. 137, 145 (1979), that a mistaken arrest and imprisonment for a period of three days pursuant to a valid warrant did not amount to a constitutional deprivation.

223. 617 F.2d at 768, 771-72.

224. *Id.* at 771-72.

225. *Id.* at 771.

226. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 145-46 (1812); *The Cristina*, 1938 A.C. 485, 502; *Pauer v. Hungarian People's Republic*, [1957] I.L.R.

of complete immunity generally has given way in the twentieth century to immunity only when a state acts in a public rather than in a commercial capacity (restrictive sovereign immunity).²²⁷ The difficulty with restricting sovereign immunity was in drawing the line between public activities (*acta jure imperii*) and commercial activities (*acta jure gestionis*).²²⁸ The distinction was particularly difficult for countries without a civil law tradition of distinguishing between actions reviewable under administrative law and actions subject to private law for the purpose of determining which court has jurisdiction.²²⁹ Nonetheless, the United States State Department announced in 1952 that in the future it would apply the restrictive theory of sovereign immunity,²³⁰ and until 1976 the courts generally deferred to State Department immunity determinations.²³¹ In the Foreign Sovereign Immunities Act of 1976²³² (FSIA), Congress attempted to

211, 212 (Corte cass., Italy, 1956). See also Restatement (Second) of Foreign Relations Law of the United States § 63 comment a (1965); M. Akehurst, A Modern Introduction to International Law 109-11 (4th ed. 1982); I. Brownlie, Principles of Public International Law 333 (3d ed. 1979); 2 D. O'Connell, International Law 843 (2d ed. 1970); Deak, *Organs of States in Their External Relations: Immunities and Privileges of State Organs and of the State*, in Manual of Public International Law 425 (M. Sorenson ed. 1968); Letter from Jack B. Tate, Acting Legal Adviser, to Department of Justice (May 19, 1952), reprinted in 26 Dep't St. Bull. 984 (1952) [hereinafter cited as Tate Letter]. But see Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Y.B. Int'l L. 220, 228-29 (1951).

227. Lauterpacht, *supra* note 226, at 250-72; Sucharitkul, *Immunities of Foreign States Before National Authorities*, 149 Académie de Droit International, Recueil des Cours 87 (1976); von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 Colum. J. Transnat'l L. 33, 36-43 (1978). The change has coincided with the development of extensive governmental undertakings in the areas of industry and commerce, particularly in socialist states. *Id.* at 36-37.

228. See Brandon, *The Case Against the Restrictive Theory of Sovereign Immunity*, 21 Ins. Couns. J. 11, 12-15 (1954); Note, *The Jurisdictional Immunity of Foreign Sovereigns*, 63 Yale L.J. 1148, 1160-61 (1954).

229. See J. Sweeney, C. Oliver & N. Leech, *The International Legal System* 311-13 (2d ed. 1981).

230. Tate Letter, *supra* note 226.

231. Republic of Mexico v. Hoffman, 324 U.S. 30, 34 (1945); *Ex Parte* Republic of Peru, 318 U.S. 578, 589 (1943).

232. Act of Oct. 21, 1976, Pub. L. No. 94-583, 90 Stat. 2891-98 (amending 28 U.S.C. §§ 1332, 1391, 1441 (1970), and enacting 28 U.S.C. §§ 1330, 1602-1611 (1976)). See generally Brower, Bistline & Loomis, *The Foreign Sovereign Immunities Act of 1976 in Practice*, 73 Am. J. Int'l L. 200 (1979); Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 Sw. L.J. 1009 (1979); von Mehren, *supra* note 227; Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 Fordham L. Rev. 543 (1977); Note, *Sovereign Immunity—Limits of Judicial Control—The Foreign Sovereign Immunities Act of 1976*, 18 Harv. Int'l L.J. 429 (1977).

codify the restrictive theory of foreign sovereign immunity²³³ and gave the courts the task of making immunity determinations.²³⁴

The FSIA provides broad immunity for foreign states,²³⁵ subject to several exceptions.²³⁶ The major exception is for actions arising out of a defendant's commercial activity having a nexus with the United States.²³⁷ An additional exception lifts immunity from noncommercial torts, but retains immunity from the tort claims of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights,²³⁸ and for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused."²³⁹ The legislative history indicates that the exception to immunity in tort "is directed primarily at the problem of traffic accidents but is cast in general terms as applying to all tort actions for money

The United Kingdom, the last major noncommunist state to accept the restrictive theory, has passed comparable legislation concerning the immunity of foreign governments. State Immunity Act, 1978, ch. 33, *reprinted in* 17 I.L.M. 1123 (1978). *See generally* Delaume, *The State Immunity Act of the United Kingdom*, 73 Am. J. Int'l L. 185 (1979); Note, *A Comparative Analysis of the British State Immunity Act of 1978*, 3 B.C. Int'l & Comp. L. Rev. 175 (1979).

233. Congress made clear that it was attempting to conform the legislation to the requirements of international law. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7, 8, 22, 23, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6604-06, 6621-22 [hereinafter cited as H.R. Rep.]. The Department of State, which prepared the legislation, informed all foreign embassies in Washington of the enactment of the FSIA by a circular note which stated in part:

The legislation will not make substantial changes in United States law on the question of when a foreign state has immunity from suit. The legislation incorporates the restrictive doctrine of sovereign immunity which the United States has consistently followed since the Tate Letter of 1952, as the appropriate rule of modern international law.

See Dept. of State File No. P77 0014-208, Dec. 10, 1976, in 1976 Digest of United States Practice in International Law 327. *See also* von Mehren, *supra* note 227, at 66.

234. H.R. Rep., *supra* note 233, at 7, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6606; von Mehren, *supra* note 227, at 52 & n.83.

235. 28 U.S.C. § 1604 (1982).

236. *Id.* § 1605.

237. *Id.* § 1605(a)(2); H.R. Rep., *supra* note 233, at 18-19, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6617-18. The Act defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d) (1982).

238. 28 U.S.C. § 1605(a)(5)(B) (1982).

239. *Id.* § 1605(a)(5)(A).

damages,” and extends to causes of action “based on strict liability as well as negligence.”²⁴⁰ The retention of immunity for claims based on specific torts and the discretionary function exception was noted to “correspond to many of the claims with respect to which the U.S. Government retains immunity under the Federal Tort Claims Act. . . .”²⁴¹ The term “discretionary” is used in the FSIA, as in the FTCA, as an adjective to describe functions, rather than (as in mandamus proceedings or in APA judicial review of agency actions) to determine the legality of particular actions. Thus, as under the FTCA, it is proper to interpret the term in light of the policies furthered by the particular immunity involved.

The policy behind foreign sovereign immunity is to avoid the disruption of friendly international relations resulting from the perceived affront to the dignity of a state caused by its being brought before the courts of a legally equal state.²⁴² Even greater danger of hostility is presented by court orders of one state to seize the property of another in order to enforce judgments.²⁴³ Moreover, an individual’s claim against a foreign government may be presented diplomatically by his government.²⁴⁴ This alternative preserves friendly relations between sovereigns and confines relations with foreign states to the executive branch, which is more capable and flexible in international affairs than the judicial branch. These policies do not weigh so heavily, however, when a defendant government has injected itself into commerce. Nor do they weigh heavily in the case of torts such as automobile negligence that any private individual might have committed, and that do not implicate any significant foreign policy concerns of the defendant state.

Application of the discretionary function exception of the FSIA should reflect these policy concerns. If the only real dis-

240. H.R. Rep., *supra* note 233, at 20-21, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6619-20.

241. *Id.* at 21, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6620.

242. *See, e.g.,* French Republic v. Board of Supervisors, 200 Ky. 18, 22, 252 S.W. 124, 125 (1923); The Parlement Belge, 5 P.D. 197, 207, 214, 220 (C.A. 1880).

243. *See* Thai-Europe Tapioca Servs. Ltd. v. Government of Pakistan, [1975] 1 W.L.R. 1485, 1490 (C.A.); United States and France v. Dollfus Mieg et Cie. S.A. and Bank of England, 1952 A.C. 582, 605; The Arantzazu Mendi, 1939 A.C. 256, 265.

244. *See* Aldona S. v. United Kingdom, 90 Journal du Droit International 190 (Pol. Sup. Ct. 1948) (1963).

pute in a tort suit against a foreign state in the United States is over the facts and local law, so that resort to diplomatic negotiations would actually burden friendly and efficient international relations, the discretionary function exception should not apply; the foreign state should be required to answer in the local court²⁴⁵ without perceiving an affront to its sovereignty. On the other hand, if the resolution of a tort claim is likely to involve a judgment of the propriety of considered decisions of foreign governments, there is a need for the application of international sovereign immunity: the foreign government may be offended by having to defend its decisions in the courts of a legally equal sovereign. In such cases, the discretionary function exception should apply.

This analysis explains the unsoundness of *Letelier v. Chile*,²⁴⁶ a case exemplifying the maxim that hard cases make bad law.²⁴⁷ Relatives and personal representatives of former Chilean Ambassador Orlando Letelier and his passenger Ronni Moffitt sought recompense for tortious injuries connected with the deaths of Letelier and Moffitt in the District of Columbia in 1976 when Letelier's car was destroyed by an explosive device.²⁴⁸ Plaintiffs alleged that the bomb was constructed, planted, and detonated by various individual defendants, acting with the aid and direction of defendants the Republic of Chile and its intelligence organ, the CNI.²⁴⁹ The district court found that it had jurisdiction because the FSIA discretionary function exception did not apply.²⁵⁰

The court noted that the exception "corresponds to the dis-

245. The FSIA provides for federal court jurisdiction for suits against foreign states, 28 U.S.C. § 1330(a) (1982), and for removal of such suits if brought in state court, *id.* § 1441(d).

246. 488 F. Supp. 665 (D.D.C. 1980). For other commentary on *Letelier*, see Note, *Sovereign Immunity*, 7 Brooklyn J. Int'l L. 465 (1981); Note, *Sovereign Immunity: Jurisdiction over Foreign States Committing Torts in the United States—Letelier v. Chile*, 21 Harv. Int'l L.J. 793 (1980); Note, *The Letelier Case: Foreign Sovereign Liability for Acts of Political Assassination*, 21 Va. J. Int'l L. 251 (1981) [hereinafter cited as Va. Note]; Note, *Political Assassination and the Jurisdiction Question: Letelier v. Republic of Chile*, 17 Willamette L. Rev. 291 (1980).

247. It is difficult to read the district court's subsequent finding of facts, 502 F. Supp. 259 (D.D.C. 1980), without being revulsed at the calculated and brutal murder described.

248. 488 F. Supp. at 665.

249. *Id.*

250. *Id.* at 673.

cretionary act [sic] exception found in the Federal Tort Claims Act,” and conceded that, in the words of the Supreme Court’s definition of “discretionary” found in *Dalehite v. United States*, the determination to set the assassination in motion was of the kind in which “there is room for policy judgment and decision.”²⁵¹ Nonetheless, the court reasoned that the exception did not apply:

[T]here is no discretion to commit, or to have one’s officers or agents commit, an illegal act. Whatever policy options may exist for a foreign country, it has no “discretion” to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law. Accordingly there would be no “discretion” within the meaning of section 1605(a)(5)(A) [of the FSIA] to order or to aid in an assassination.²⁵²

We have seen that it is unsound, and not really supported by *Hatahley*,²⁵³ to reason that there is no discretion to violate the law in determining whether the FTCA discretionary function exception applies.²⁵⁴ The ministerial-discretionary distinction, from which the reasoning derives, is used in cases challenging the legality of administrative action; it loses its relevance in cases where a tort cause of action is based on the nature of the functions executed by the official and the reasons for the particular immunity, apart from the legality of the actions.

The idea that there is no discretion to violate the law is even less useful in the foreign sovereign immunity context. If “committing an illegal act” includes violating only domestic (national) law, then any state could circumvent the international law requirements of sovereign immunity by declaring (or making) the action of the foreign sovereign contrary to the law of the forum state. For instance, the principle might allow Iran to find the United States liable for personal injury or property damage resulting from the unsuccessful attempt by United States military forces in April, 1980, to rescue the hostages in Teheran.²⁵⁵

251. *Id.* (quoting *Dalehite v. United States*, 346 U.S. 15, 36 (1953)).

252. 488 F. Supp. at 673 (citations omitted).

253. *See supra* note 164 and accompanying text.

254. *See supra* text accompanying notes 153-70.

255. Suggestion of Monroe Leigh, former Legal Adviser, Department of State, reported in Va. Note, *supra* note 246, at 267 n.86.

A principle that allows a state to take or leave an international norm would not be consistent with the international law that the FSIA was trying to reflect.²⁵⁶ On the other hand, if "committing an illegal act" is taken to mean only an act contrary to international law,²⁵⁷ then the violations will also be action which the government of the injured party may legitimately raise at the diplomatic level. For the very reasons underlying the immunity, the issues in many cases will best be raised at the diplomatic level. To say that there is no discretion to commit an illegal act is not a sufficient basis for rejecting application of the discretionary function exception.

What then should be the basis for determining whether the discretionary function exception of the FSIA should apply? It is possible to infer from the legislative history of the Act that the courts should borrow the jurisprudence of the FTCA; the legislative history states that the FSIA exception corresponds to the FTCA exception.²⁵⁸ Such an analysis would not necessarily further the purposes of the FSIA.

The contours of the exception in the FTCA must be derived in large part from the purpose of the exception—to preserve the separation of powers balance reflected in the APA.²⁵⁹ The exception in the FSIA has a different purpose because the immunity that it preserves (international sovereign immunity) has a purpose different from that of the immunity of a state in its own courts²⁶⁰. Ultimately, the basis for domestic sovereign immunity (like the discretionary function exception which preserves it in some cases) is the policy supporting the separation of powers between the legislative and judicial branches.²⁶¹ The basis for in-

256. See *supra* note 233.

257. The district court found that the asserted act was "clearly contrary to the precepts of humanity as recognized in . . . international law." 488 F. Supp. at 673.

258. See *supra* text accompanying note 241; see also 488 F. Supp. at 673.

259. See *supra* text accompanying notes 170-213.

260. *Nevada v. Hall*, 440 U.S. 410, 415-17 (1979); Rogers, *Applying the International Law of Sovereign Immunity to the States of the Union*, 1981 Duke L.J. 449, 458-61 (1981).

261. In short, the argument favoring domestic sovereign immunity is that decisions as to whether or not to compensate persons for previous violations of legal rights, unlike decisions involving prospective relief, are better made by legislatures than courts because of the legislature's superior ability to allocate limited public funds through its responsiveness to popular views and its ability to weigh interests. See Rogers, *supra* note 260 at 459-60.

ternational sovereign immunity is to preserve orderly and friendly relations between states by avoiding perceived indignities and resolving governmental disputes diplomatically as equal parties.²⁶² The distinct underlying purpose of the immunity of foreign states suggests that the FSIA discretionary function exception should be interpreted accordingly, rather than simply to further the separation of powers concerns of the FTCA.

Courts should look to the body of international law found in foreign cases and previous United States State Department determinations²⁶³ to ascertain which types of tort suits do not burden international relations and therefore are not within the discretionary function exception to FSIA liability. Immunity generally has been allowed for allegedly tortious military activities of one state in the other (forum) state,²⁶⁴ even if the activity could have been undertaken by a private person.²⁶⁵ If the tort arose out of commercial activities such as the negligent operation of a passenger airliner,²⁶⁶ a passenger bus,²⁶⁷ or a shipping

262. See *supra* text accompanying notes 242-44.

263. The immunity determinations of the Department of State between the time of the Tate Letter, *supra* note 226, and the passage of the FSIA have been indexed and made public. See Sandler, Vagts & Ristau, *Sovereign Immunity Decisions of the Department of State: May 1952 to January 1977*, in 1977 Digest of United States Practice in International Law 1017 [hereinafter cited as Sandler].

264. *Kendall v. Kingdom of Saudi Arabia*, cited in Sandler, *supra* note 263, at 1053-54 (S.D.N.Y. 1965) (U.S. suggestion of immunity for Saudi Arabia from claim based on firing by Saudi militiamen on an amphibious aircraft in the Gulf of Aqaba); *Martinson v. Government of Israel*, cited in Sandler, *supra* note 263, at 1034-35 (S.D.N.Y. 1957) (U.S. suggestion of immunity for Israel from negligence suit for injuries incurred while repairing an Israeli military vessel in New York); *Abouteboul c. Etat Hellénique*, 1 *Revue Hellénique de Droit International* 279 (Mixed Court of First Instance, Alexandria, Egypt, 1948), 44 *Am. J. Int'l L.* 420 (1950) (bicycle struck by Greek army truck in Egypt); *Ter K. v. State of the Netherlands, Surinam and Indonesia*, 18 *I.L.R.* 223 (Dist. Ct., The Hague, Neth., 1951) (Indonesian immunity for alleged mistreatment of prisoners during World War II by predecessor of Indonesia).

265. *Sawchuck v. Netherlands Ministry of Traffic*, cited in Sandler, *supra* note 263, at 1039 (N.Y. Sup. Ct. 1960) (U.S. suggestion of immunity for the Netherlands from claim arising from an accident in which a venetian blind fell upon plaintiff while he was cleaning windows for the defendant; the Netherlands ambassador had asserted that the Traffic Bureau involved was in charge of the organization of transport to the Netherlands "of materials and commodities acquired by the Netherlands Ministry of Defense in the United States for the use of the Netherlands Armed Forces").

266. *Anderson v. South African Airways*, cited in Sandler, *supra* note 263, at 1029-30 (S.D.N.Y. 1955) (U.S. refusal to suggest immunity).

267. *In re Danish State Rys. in Germany*, 20 *I.L.R.* 178 (Dist. Ct., Kiel, W. Ger., 1953).

vessel,²⁶⁸ there would be no immunity under the restrictive theory, but this result obtains under the FSIA without regard to the discretionary function exception.²⁶⁹ The difficult case occurs when a nonmilitary official acts for a governmental and clearly noncommercial purpose, but the particular act is one that a private individual could undertake.²⁷⁰ The trend has been to allow such suits.²⁷¹ The Austrian Supreme Court, for example, refused to grant immunity to the United States for the negligent driving of an automobile carrying United States Embassy mail.²⁷² The court reasoned:

[W]e must conclude that the act from which the plaintiff derives his claim for damages against the defendant is not the collection of mail but the operation of a motor car by the defendant and the latter's action as a road user. By operating a motor car and using the public roads the defendant moves in spheres in which private individuals also move. In these spheres the parties face one another on a basis of equality, and there

268. *New York & Cuba Mail S.S. Co. v. Republic of Korea*, 132 F. Supp. 684 (S.D.N.Y. 1955), cited in Sandler, *supra* note 263, at 1028-29 (U.S. refusal to suggest immunity).

269. See *supra* notes 235-39 and accompanying text.

270. The same quandary is presented in the context of contract disputes, for instance over contracts to purchase military supplies. The FSIA clearly rejected the dictum in the much-cited case of *Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 359-60 (2d Cir.), cert. denied, 381 U.S. 934 (1964), that there would be immunity from claims based upon such contracts. 28 U.S.C. § 1603(d) (1982); H.R. Rep., *supra* note 233, at 16, reprinted in 1976 U.S. Code Cong. & Ad. News at 6615. However, nothing in the FSIA or its history prevents use of the immunity categories of *Victory Transport*, 336 F.2d at 360, to give substance to the discretionary function exception of the FSIA.

271. *Renchard v. Humphries & Harding*, 59 F.R.D. 530 (D.D.C. 1973) (U.S. refusal to suggest immunity from claim for property damage caused by construction of an embassy); *Pruitt v. M/V Patignies*, cited in Sandler, *supra* note 263, at 1060-61 (E.D. Mich. 1968) (U.S. refusal to suggest immunity for Canada in case involving a collision on the Great Lakes alleged to be due to the negligence of a pilot furnished by the Canadian Government, where furnishing pilotage service is "an operation open to and in fact carried on by private enterprise"); *Cole v. Heidtman*, cited in Sandler, *supra* note 263, at 1062-63 (S.D.N.Y. 1968) (U.S. refusal to suggest immunity from suit against British West Indies Central Labour Organization for, *inter alia*, blacklisting and false imprisonment in the U.S. on the grounds that the organization's activities "are very much akin to those that might be conducted by a labor union or by a private employment agency"). But see *Melone v. Republic of Chad*, cited in Sandler, *supra* note 263, at 1049 (City Ct. N.Y. 1964) (U.S. suggestion of immunity from claim arising from auto collision in New York incident to a social engagement at the house of the Ambassador of Gabon on the ground that "it was an official dinner").

272. *Collision with Foreign Government-Owned Motor Car (Austria) Case*, 40 I.L.R. 73 (Aus. S. Ct. 1961).

is no indication here of any supremacy and subordination. . . . The damage which the plaintiff alleges was not caused by the collection of mail from the airport but by the operation and management of the motor car and the use of public roads by the defendant.²⁷³

In supporting its conclusion, the court considered some factors that might lend themselves to the framing of a standard:

The risk of political complications is far greater if disputes of a private nature are fought out on the diplomatic level before the facts and the legal position have been clarified. Experience shows that the objective judgment of an independent court is more likely to be accepted than a political decision. The foreign State is not in the least hindered in the performance of its tasks if—like all other road users—it is brought before a court to have its liability for an accident determined in accordance with the provisions of civil law.²⁷⁴

Accordingly, one could argue that there should not be immunity from tort suits if (1) politicizing the suit would be more likely to poison than to preserve friendly relations (for instance, because of the petty nature of the dispute); (2) determination of the facts would render the persistence of an intergovernmental dispute regarding payment unlikely; and (3) legitimate foreign activities in the country would not be hindered by treating the foreign government defendant as a private individual.²⁷⁵

Viewing the FSIA discretionary function exception as incorporating international jurisprudence and State Department decisions furthers the purposes of the FSIA and international sovereign immunity more directly. It is, therefore, preferable to

273. *Id.* at 77. A slightly different translation of the passage from the same opinion may be found *sub nom.* *Holoubek v. United States*, in 6 M. Whiteman, *Digest of International Law* 657 (1968).

274. 40 I.L.R. at 78.

275. How these factors would apply in the case of a military vehicle negligently driven in a foreign country is not easily determined. The logic of the Austrian Supreme Court suggests that immunity should be denied, unless it is assumed that governments are particularly sensitive with regard to challenges to military activities without regard to the petty nature of the challenge, thus negating factor (1). *See supra* notes 263-64 and accompanying text. In an unpublished opinion, the District Court for the Southern District of New York held that France was immune under the FSIA from suit on a claim for damages resulting from the ramming of a pier in New York harbor by a tugboat towing a French aircraft carrier. *Consolidated Edison Co. v. Aircraft Carrier Foch*, No. 76 Civ. 2446 (RLC) (S.D.N.Y. Jan. 5, 1979).

view the FSIA as not incorporating the law of the FTCA exception. As one example, the distinction between "governmental" and "private" activity that is now clearly rejected under the FTCA²⁷⁶ may be of much greater relevance under the FSIA, where the sensitivities of foreign governments are concerned.²⁷⁷ It thus makes sense to interpret differently the discretionary function exceptions of the FSIA and the FTCA.²⁷⁸ These distinct interpretations are made possible by interpreting the term "discretionary"—whenever used to describe tort immunity for the exercise of a "function"—as shorthand for the application of policy factors related to the purpose of the particular immunity.

CONCLUSION

When government agencies make choices, they exercise discretion. They do this all the time. If the act or choice is one of several permitted by the governing law, the act or choice is "discretionary." If the governing law gives the agency no choice—that is, it forbids some choices or limits the choices to one—action is nondiscretionary or "ministerial." If the governing law gives the agency more than one choice, but prescribes to some extent the basis or reasoning for making the choice, the action is still discretionary, but use of an improper basis is an abuse of discretion. To the extent that the governing law permits more than one choice without regard to the agency's basis or reasoning, abuse of discretion is impossible because the choice is "committed" to agency discretion. When an agency makes a choice that is not within the range of permissible choices, it may be said to have "exceeded its discretion." Use of terms involving

276. *Rayonier Inc. v. United States*, 352 U.S. 315, 318-20 (1957); *Indian Towing Co. v. United States*, 350 U.S. 61, 64-69 (1955).

277. *Compare Waltier v. Thompson*, 189 F. Supp. 319 (S.D.N.Y. 1960) (U.S. suggestion of immunity for foreign consular official accepted where claim was based on allegedly false statements which induced the plaintiff to move to Canada. The State Department found the consular official's acts, including interviewing and advising prospective immigrants to Canada, to be in the course of, or in connection with, official duties constituting sovereign or public acts), *with* cases cited *supra* in note 271 (U.S. refusals to suggest immunity in various contexts where defendants were engaged in arguably governmental activities).

The district court in *Letelier* rejected the contention that foreign states under the FSIA are to be granted immunity for tortious acts committed by a sovereign entity while acting in its public capacity, 488 F. Supp. at 672 n.6, without considering whether such a consideration might be incorporated in the discretionary function exception.

278. *See supra* text accompanying notes 96-101.

“discretion” this way resolves several conceptual difficulties in the areas of mandamus and nonreviewability of agency action.

When agency action is challenged in tort suits for damages, these distinctions are not very helpful in determining whether agency actions are “in the exercise of a discretionary function” (or “in the exercise of discretionary duties”). Most agency functions and duties involve permitted choices, while tort law in most cases contemplates that a particular action is either permitted or not, regardless of motivation. Sound decisionmaking would be furthered by interpreting “discretionary function” to further the policies of the particular immunity the term was intended to preserve. Since the purposes of official immunity, domestic sovereign immunity, and foreign sovereign immunity are different, interpretation of “discretionary function” should vary according to the particular tort immunity context.